

IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA

LESTER E. KIRKLAND, JR.,
PLAINTIFF

VS

NORFOLK SOUTHERN
RAILWAY COMPANY,
DEFENDANT

"

"

"

"

COPY

Civil Action No.

45273

TRIAL

held before

HON. WILLIAM P. ADAMS

and a JURY

VOLUME II of III

March 20, 2001

9:00 a.m.

Bibb County Courthouse
Macon, Georgia

REPORTED BY: Julia J. Scarborough

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1 LESTER KIRKLAND

2 Witness having been first

3 duly sworn, testified on

4 CROSS EXAMINATION

5 BY MR. GARLAND:

6 Q Good morning, Mr. Kirkland.

7 A Good morning, Mr. Garland.

8 Q Let me ask you a few questions, please. You
9 testified you live in -- is it Cross Hill, South Carolina?

10 A Yes, sir.

11 Q Is there a lake there?

12 A Yes, sir, there is a lake there.

13 Q You live on the lake?

14 A Yes, sir.

15 Q What is the name of that lake?

16 A Lake Greenwood.

17 Q How far is it from Columbia?

18 A About 60 -- 60 miles, 65 miles.

19 Q Now, I understand you live there by yourself?

20 A Yes, sir.

21 Q You mentioned yesterday that you are divorced?

22 A Yes, sir.

23 Q The ex-wife that took the pictures; is that right?

24 A Yes, sir.

25 Q What is her occupation?

1 MR. WETTERMARK: Objection, Your Honor, what
2 relevance does that have?

3 THE COURT: I don't know. Does it have any
4 relevance?

5 MR. GARLAND: I don't know. I am asking him what
6 his occupation is, I think that's a --

7 MR. WETTERMARK: I object. His ex-wife's
8 occupation is irrelevant.

9 MR. GARLAND: I don't know if she is a photographer
10 or what she is, but I --

11 THE COURT: You can ask if she is a photographer.

12 MR. GARLAND: I think I have got him on cross
13 examination, Your Honor, and I feel like that's an issue
14 that -- they have got evidences of tax returns that they
15 put in, I don't think it makes much sense without talking
16 about that. They are their exhibits, they are not mine.

17 THE COURT: Does that reflect the ex-wife's
18 income? I don't know, I haven't looked at the tax
19 returns.

20 MR. WETTERMARK: His ex-wife's job is irrelevant
21 to this case. It's about this gentleman.

22 THE COURT: Does the jury already have
23 information in effect through those tax returns about her
24 income?

25 MR. GARLAND: I imagine they will, Your Honor, he

1 suggested --

2 THE COURT: They were admitted.

3 MR. WETTERMARK: Yes, sir. The tax returns are
4 in.

5 THE COURT: I will overrule this objection, but I
6 don't think much inquiry beyond that would be
7 appropriate.

8 MR. GARLAND: Yes, sir.

9 Q Mr. Garland: What is and was her occupation,
10 please, sir?

11 A She is an investment broker.

12 Q Where is her office?

13 A In Aiken, South Carolina.

14 Q How far is Aiken from the lake there where you
15 live?

16 A About 52 miles.

17 Q Now, she had a daughter; is that correct, when you
18 got married?

19 A Yes, sir, that's right.

20 Q The daughter lived with her?

21 A Yes, sir.

22 Q Now, was that your first marriage?

23 A No, sir.

24 Q You had been married in fact twice before; is that
25 correct?

1 MR. WETTERMARK: Again, Judge, what relevance
2 does that have to this case? I'm sorry, objection,
3 that's irrelevant.

4 MR. GARLAND: Your Honor, I think -- we can explore
5 this man's background, where he lives, that sort of
6 thing. I think that's just a question that I have got a
7 right on cross examination to ask.

8 THE COURT: Well, I mean, you inquired about his
9 education, his employment history, I think his marital
10 back -- I will overrule the objection.

11 A The Witness: I'm sorry, what was the question?

12 Q So you have been married and divorced three times;
13 is that correct?

14 A Yes, sir.

15 Q Now, you graduated from Greenville High School; is
16 that right?

17 A Southside.

18 Q What year was that?

19 A '73, '74, somewhere in there.

20 Q Now, you mentioned your father worked for Norfolk
21 Southern Railroad; is that correct?

22 A Yes, sir.

23 Q Is he retired?

24 A Yes, sir.

25 Q What is the nature of his retirement?

1 A I don't understand the question. He is 71.

2 Q Well, did he -- what age was he when he retired?

3 A 56.

4 Q What was the nature of the retirement?

5 MR. WETTERMARK: Objection, Your Honor,
6 irrelevant.

7 MR. GARLAND: Well, I don't know until he answers,
8 Your Honor, but I think it's relevant to the case.

9 THE COURT: Well, I will sustain that objection.

10 Q Mr. Garland: Now, what was your first job
11 assignment with the railroad?

12 A As a trainman.

13 Q First job assignment with the railroad?

14 A It was an Air Wood local in Charlotte, North
15 Carolina.

16 Q Did you then move up to Charlotte, North Carolina?

17 A Yes, sir. I rented an apartment.

18 Q How long were you in that position in Charlotte,
19 North Carolina?

20 A A little over a year. My dad came up there and
21 worked with me.

22 Q And then did you move back down to where?

23 A Back to Greenville.

24 Q Now, you were then -- you worked a while and were
25 promoted to conductor; is that correct?

1 A Yes, sir, that's correct.

2 Q And for a while, I believe, you testified you worked
3 in the office as a dispatcher; is that right?

4 A Yes, sir. That's correct.

5 Q What office was that where you were the dispatcher?

6 A In Greenville.

7 Q Now, it's true, isn't it, that the conductor really
8 supervises the switching of the cars at the industry; is that
9 one of the functions of a conductor?

10 A Yes, sir, that's correct.

11 Q You are familiar, are you not, with the safety
12 rules, the little booklets?

13 A Yes, sir.

14 Q Are you familiar with the specific rules that apply
15 to conductors?

16 A Yes, sir.

17 Q Are there certain rules that apply to everyone,
18 certain safety rules?

19 A Yes, sir.

20 Q Look at Exhibit 4.

21 MR. GARLAND: May I approach the witness?

22 THE COURT: Yes, sir.

23 Q Mr. Garland: Does that appear to be a copy of
24 Safety Rule "M" from the Safety Rule Book?

25 A Yes, sir.

1 Q Read, if you will, please, the second paragraph of
2 that rule.

3 A It says, "employees must not do any work in a manner
4 that will jeopardize their own safety or the safety of others.

5 They must know that appliances, tools, supplies, and
6 facilities used in performing their duties are in proper
7 condition. If not, they must have them put in order before
8 using them. It is the duty of every employee to examine them
9 to determine their condition."

10 Q Thank you. And did you understand that that's a
11 rule that applies to all railroad employees, safety rule; is
12 that correct?

13 A Yes, sir.

14 Q Conductors and everybody?

15 A Yes, sir. Everyone.

16 Q Now, look, if you will, please, at Rule 581, Exhibit
17 5? Are you familiar with Rule 581?

18 A Yes, sir.

19 Q Would you please read the rule as to what it says
20 about conductors?

21 A "Conductors have charge of trains to which they are
22 signed, and of all employees thereon. They are responsible
23 for safe and proper management of their trains for protection
24 and care of passengers and property for performance of duty by
25 train employees, and for observance and enforcement of all

1 rules and instructions."

2 Q And that rule connects with the evidence you have
3 already testified to, that the conductor is the person on that
4 train with that crew in charge of the train?

5 A Yes, sir, I am in charge of the train.

6 Q Now, look, please, if you will, at Exhibit 3, which
7 is Rule 586, are you familiar with 586?

8 A Yes, sir.

9 Q And please read that rule.

10 A "Conductors must, if possible, remedy defects in
11 their equipment and must remove from the consist any cars that
12 are unsafe to run. They must report all defective brakes,
13 hotboxes or other defects, as well as repairs made between
14 terminals. They must comply with instructions for reporting
15 materials applied to cars and disposition of defective parts."

16 Q Thank you.

17 MR. GARLAND: I move for admission of Defendant's
18 Exhibits 3, 4, and 5.

19 MR. WETTERMARK: No objection.

20 THE COURT: They're admitted.

21 Q Mr. Garland: Mr. Kirkland, prior to this injury in
22 '98, had you ever been in any automobile accidents or
23 collisions or anything like that prior to that time?

24 A Yes, sir.

25 Q And was one an automobile accident around 1990

1 involving really three cars?

2 A Yes, sir.

3 Q And were you, as a result of that accident, admitted
4 to the emergency room at Greenwood Hospital?

5 A Yes, sir.

6 Q And you were treated for injuries, neck injuries; is
7 that correct?

8 A Yes, sir, whiplash type.

9 Q And had to wear a collar and so forth for a while?

10 A Yes, sir.

11 Q Now, there was another accident automobile at about
12 that same time; is that right, shortly after that?

13 A Before.

14 Q Before that, all right. Was that where a lady ran
15 into your car at an intersection?

16 A Yes, sir. She hit me in the side door.

17 Q Driver's side door; is that correct?

18 A Right.

19 Q Now, the job as conductor you had in January of
20 1998; is that the same job and the same route that you had
21 been working for eight or nine years before that time?

22 A Yes, sir, most of time, yes, sir.

23 Q Did you ever request during that eight or nine year
24 period to be transferred to another route or another conductor
25 job?

1 A I didn't request, but you would periodically get
2 pulled, you know, that's what your senior -- you could get
3 pulled any time, and then you would have to go somewhere
4 else.

5 Q Did you pull anybody else during those seven or
6 eight years, eight or nine?

7 A Yes, sir. I was pulled off the Aiken local myself.

8 Q Didn't you pull somebody else somewhere else?

9 A I went back to Newberry job.

10 Q And how long did you work there?

11 A About six months.

12 Q And then you pulled somebody else to get back to
13 Aiken; is that right?

14 A Right, to get back to my wife; that's right.

15 Q So as I understand what you just said, you were
16 pulled and you went to the Newberry job for six or eight
17 months?

18 A Yes, sir. There's always a lot of moving around.

19 Q And then you pulled somebody else to get back to
20 the Aiken job where you were in January of '98; is that
21 correct?

22 A Yes, sir, when somebody younger than me got on it.

23 Q What other industries does the Aiken run pick up
24 from and leave off of, other than the Grace and Company?

25 A A bunch. About 14 industries, I think it is, that

1 Aiken local switches.

2 Q Can you tell us what they are?

3 A Yes, sir. Out at the three clay mines are W. R.
4 Grace, Kentucky-Tennessee, Southeastern Clay, then you go in
5 the other direction, and it's Florida Steel, Owens-Corning, a
6 fiberglass company.

7 Q What do you pick up there at Owens?

8 A Owens Corning, you take them loads, it's a reverse
9 of W. R. Grace. You take Owens Corning loads of material that
10 they use to make fiberglass, and then you pull out their empty
11 cars.

12 Q Okay.

13 A So Owens-Corning and Florida Steel; and then there's
14 a metal service place that gets metal; there's another clay
15 mine, J. M. Huber, that gets tank cars, they load clay; then
16 there's a fiberglass place in Trenton, I can't think of the
17 name of it, but there's another fiberglass place, a small one;
18 then there's Graniteville Company.

19 Q What do you move out of or into Graniteville?

20 A You move coal cars from -- they must still run off
21 of coal, and then caustic soda tanks that I think they use to
22 dye, to color blue jeans and stuff. And then we have two more
23 clay mines down there. We have Dixie Clay at Bath and then we
24 have Langley, it used to be called J. M. Huber-Langley, and I
25 don't know what it's called now. And since I have gotten hurt

1 there's a big Bridgestone tire plant been added down there, I
2 think. That's all I can think of from memory.

3 Q Does the kaolin belt kind of run from South Carolina
4 on down into Georgia where the kaolin is mined from; do you
5 know that?

6 A Yes, sir, there is a lot of clay mines.

7 Q Have you ever been out to those clay mines?

8 A I don't understand the question.

9 Q Have you ever been to a clay mine?

10 A No, sir, just the loading facilities on the train.

11 Q Do you know how the kaolin gets from the kaolin mine
12 into the loading facility?

13 A No, sir.

14 Q Do you know if it is on your train or trucks, or do
15 you have any idea how it comes in?

16 A It's not on my train. I don't know -- I don't know
17 if the other plants have it trucked in or trained in or if
18 they actually mine it right there. I don't really understand
19 the mining part of it.

20 Q Have you ever been behind those trucks loaded with
21 kaolin as they are coming down the road?

22 A I haven't. I mean, I have never seen them. That's
23 what we were talking about, I have never seen them coming into
24 the plant.

25 Q Now, is it correct that when it rains and the kaolin

1 is wet it's slippery; is that correct?

2 A Yes, sir.

3 Q Have you had occasion when new people come to work
4 that job to tell them anything about the kaolin, and if so,
5 what do you tell them?

6 A I tell the new people that come, you know, we are
7 having a lot of trouble with the Grace plant, and it's real
8 dangerous. And I tell them to be -- you know, be careful, and
9 I try to let them stay up at the switch. And I have more
10 experience, so I go down there and try to mess with it.

11 Q The walkway; is it a solid face or is it kind of
12 like that egg carton effect, that walkway that you are on when
13 you turn the wheel?

14 A It has little perforations in it.

15 Q Is that where the water and all drips through?

16 A Yes, sir. I guess that's what it's for.

17 Q Is it also where you are more stable on that than
18 just a solid surface?

19 A You are stable when it's dry, and you know, and
20 clean, but you are not stable when it's got the clay on it.

21 Q The little eggshell carton things kind of stick up;
22 is that right?

23 A Yes, sir.

24 Q Do you know what a car handling report is?

25 A Yes, sir.

1 Q Tell the jury what that is.

2 A If I have got the right one, it's like a -- you
3 know, what cars you have handled that day and stuff and --
4 used to call it like a train and handle delay, and --

5 Q Is it also -- is there a procedure within the
6 company where if you encounter an unsafe condition you fill
7 out a report or a form about it?

8 A Yes, sir, they have had those.

9 Q Is that the same form or is that another form?

10 A I am not really sure.

11 Q You have filled those out, have you not, from time
12 to time?

13 A Oh, yes, sir. Like a -- for switches, and stuff
14 like that that need repair.

15 Q How about for cars?

16 A For cars --

17 Q I am asking you now about the car handling report.
18 Have you filled some of those out that relate to cars?

19 A No, sir. Usually I just report them to the
20 officers, you know, and -- now if it's a bad order brake or
21 something, you know, I will call Augusta shop and talk to them
22 and find out where to actually set the car so they can come
23 and repair that car.

24 Q If you encounter an unsafe condition, you fill out
25 one of those forms to make a report of that, do you not, sir?

1 A Yes, sir.

2 Q And is that the same form we are talking about, or
3 is that another form?

4 A I think it's the same form.

5 Q And you have done that before, haven't you?

6 A Yes, sir.

7 Q Now, to your knowledge, Mr. Kirkland, before you
8 slipped in January of '98 and was injured, to your knowledge,
9 has anyone else, any other railroad employee, ever gotten hurt
10 slipping off a car at the Grace place before?

11 A Yes, sir.

12 Q When did you -- do you recall giving a deposition in
13 this case?

14 A Yes, sir.

15 Q Where you were under oath?

16 A Yes, sir.

17 Q Do you recall asking -- let me just show you.

18 MR. GARLAND: May I approach the witness?

19 THE COURT: Yes, sir, you may.

20 Q Mr. Garland: Specifically, Mr. Kirkland, do you
21 recall back in January of '99, two years ago, January 13,
22 '99 --

23 A Yes, sir.

24 Q -- giving a deposition here in Macon, Georgia?

25 A Right.

1 Q Before a court reporter?

2 A Yes, sir.

3 Q Sworn to tell the truth?

4 A Yes, sir.

5 Q Do you remember that question that I asked you --
6 and let me read the question, it's page 58, line 20. The
7 question was: "To your knowledge, has anybody ever gotten
8 hurt before January 23rd". And what was your answer?

9 A I said, "I think, I am just not sure".

10 Q All right. Is that correct? Are you not sure or --
11 what is the correct answer to that?

12 A Well, if I am understanding it correctly, you know,
13 I can name names of people that have fallen there, and I can
14 name names of people that have been injured, you know, on
15 those cars.

16 Q And how did that knowledge come to you now that you
17 didn't have two years ago, because that's -- two years ago,
18 when you were asked the question, you said you didn't know of
19 any.

20 A I said I wasn't -- I said, I think, I am not sure.
21 I just was nervous, that was my first ever deposition.

22 Q Now, how exactly do the employees at W. R. Grace and
23 Company blow this excess dust and powder kaolin off of the
24 cars? What do they use to do that with?

25 A Well, you had it wrong. You were explaining that it

1 was like a car wash type --

2 Q You tell us how it is.

3 A -- to where -- that it was like the cars would go
4 under, like a car wash, and it would just blow it off, and the
5 car would come out clean, but that's not how it's done. It's
6 -- there is like a thing -- they have to hook up the little
7 air hoses, and they have a wand, and they will get up on the
8 car and they will hook up their safety harnesses, and it takes
9 a good deal of time, and they have to manually blow it off,
10 and then you get it off the top, it gets -- and then they have
11 to get down and get it all off the grab irons, and then they
12 go to the next car. It's not just like a car wash part where
13 you follow through there.

14 Q You say they, who is this that is doing this?

15 A That's W. R. Grace's job.

16 Q Those are the Grace employees that do it, those are
17 not the railroad employees, are they?

18 A No, sir, that's the Grace employees.

19 Q Is there a certain employee that has that as his
20 job, or do you know, or is it a different one every time?

21 A It's different ones, and different -- they always
22 put it on a different shift. They always say, that's third
23 shift, that's second shift.

24 Q Now, Mr. David Woods is who?

25 A He was -- we kind of called him the plant manager, I

1 didn't know his exact title. But there were little shift
2 managers like Mark and Ricky and Charles, and then David Wood
3 sat in a big office and he was over them.

4 Q Is Mr. David Wood; he is a Grace and Company
5 manager; is that right?

6 A Yes, sir.

7 Q Now, is he the main man you complain to about the
8 kaolin situation?

9 A Yes, sir, I would complain to the little ones --

10 Q Mark and -- yes.

11 A -- and then I would go -- the main one was David
12 Wood.

13 Q And when you complained to him did it get better for
14 a period of time after you had had one of those meetings with
15 him?

16 A Sometime it would, yes, sir. He would talk to them
17 and get them to blow it off, or I would go in there mad and
18 tell him I wasn't pulling the cars. And then he would make a
19 phone call to Mr. Mass, and say Mr. Mass wants to talk to you.

20 Q Have there been occasions when you felt they didn't
21 blow the kaolin off properly and you called it to their
22 attention and they came out and blew it off some more before
23 you left; had that happened?

24 A Yes, sir. There were days that I would pitch a fit,
25 and I guess he couldn't find Mr. Mass to make me pull the

1 cars, and he would come out there, and if it was one or two,
2 you know, he would blow it off a little bit.

3 Q And it's never been a case, has it, when you went to
4 Mr. David Woods and said, you know, they didn't do a very good
5 job on this car, I need them to blow it a little more that he
6 refused to let them blow it a little more, did he?

7 A Yes, sir, there was cases of that.

8 Q What would he say?

9 A He would say, I will take care of it, and he would
10 walk off, like he did on Monday the 26th.

11 Q I'm asking, you know, about Mr. David Wood, the
12 manager at Grace and Company?

13 A Yes, sir.

14 Q You testified sometimes you would complain to him
15 before you pulled the cars off and he would send a fellow back
16 and let him blow it some more; is that right?

17 A Yes, sir.

18 Q But then you are saying now sometimes you would
19 complain and he wouldn't do that?

20 A Yes, sir. Sometimes I would complain and he
21 wouldn't blow the cars off.

22 Q Did he give you any reason?

23 A No, sir.

24 Q When it was raining did it do any good to blow it
25 off again?

1 A I don't know about that. I mean, I am sure it would
2 get some of it. It might help to sweep it.

3 Q Did you ever yourself get up there and kind of sweep
4 it off yourself; you ever do that?

5 A No, sir.

6 Q Did you ever ask the Grace and Company employees
7 that it's now blowing off good, it's wet, to come with a
8 little broom and sweep it? Did you ever ask them to do that?

9 A I didn't know how they could get it off. I did tell
10 them, I said, it needs to get off.

11 Q If you don't know how they could get it off, how do
12 you think they could if it was raining and wet? Is it any way
13 that you know of?

14 A Well, I'm sure they could get it off some kind of
15 way, it's just not my job to -- I didn't work for W. R. Grace
16 plant.

17 Q Did you ever meet with Mr. Wood and say, Mr. Wood,
18 why don't you get a little broom up there? Did you ever ask
19 him to do that?

20 A Yes, sir. We made several -- lots of suggestions.

21 Q Did he follow up with a broom?

22 A We never did make the suggestion with the broom. I
23 said we made plant suggestions. I didn't ever make a broom
24 suggestion.

25 Q Is it true that when it wasn't wet, and when they

1 didn't do a very good job of blowing it off, when you left the
2 plant it would blow off as it travelled down the track?

3 A A lot of it would blow off, some of it -- and it
4 would be a big cloud. We would come around a curve and cars
5 would back up, they would roll their windows up, see us
6 coming, and it would be just a big cloud.

7 Q You have never been behind a truck, though, with
8 kaolin, you talked about, and seen the -- blow off of that
9 truck, have you?

10 A No, sir, not like that. I think -- I don't know if
11 they are enclosed or how the clay gets there. I have never
12 ridden down the road and seen it like that, I mean, from
13 following us.

14 Q You testified yesterday that when you go in to pick
15 the full cars up you didn't have to get up on them, you just
16 pull them off; is that right, and then you get up on them to
17 release the break when you get wherever they are going; is
18 that right?

19 A Right. You know, sometimes you would have to get
20 up, it's according to -- like if every car was loaded -- see
21 there might be 15 cars in the plant, and if they were
22 shipping them all, then you might have to get up on some of
23 them. They wouldn't have -- lot of times they wouldn't have
24 brakes on any.

25 Q And what you were talking about yesterday --

1 A But you would have to couple them and couple the
2 hoses.

3 Q Well, specifically on the 23rd and the 26th is when
4 you made that statement yesterday; isn't that right?

5 A Right. On the 26th I had to get up on those cars.

6 Q When you got to the other end, isn't that what you
7 said?

8 A If I understand the question, the seven loads that I
9 pulled on Monday, the 26th, that I asked Mr. Chapman could I
10 leave and I asked Mr. Woods could I leave, when they told me I
11 had to switch those cars I had to get up on those cars to get
12 the brakes off. I didn't want to, but I had to.

13 Q Was that -- when you made that little slip, was that
14 there at Grace and Company or was that at Warren?

15 A No, sir. It was back at Aiken -- at Aiken Depot.

16 Q But you didn't testify yesterday that you didn't
17 have to get up, you were able to just couple them and take
18 off; do you remember that testimony yesterday?

19 A Yes, sir. I remembered it as the three cars on
20 Friday.

21 Q But it's different you say on Monday?

22 A Yes, sir, because there was -- like a bunch of loads
23 on Friday, and I don't remember getting up on the cars on
24 Friday. I may have, but they might have been in the middle of
25 the cut.

1 Q So when you were talking to us yesterday about just
2 being able to couple it up and not having to get on it until
3 you got down the road, you were just talking about Friday; is
4 that what you are telling us, or do you remember which day it
5 was?

6 A I know I had to get on the cars on Monday because
7 they were shipping like all of the loads, so I had to get on
8 those loads. They had loaded all weekend, and they were out
9 of empties and we took them more empties. On Fridays they
10 will have a lot of cars out there, and I may or may not have
11 had to get on those cars. I don't remember -- we try not to
12 get on them if we don't have to.

13 Q So you are really not sure whether you got on them
14 or not; is that what you are telling us now?

15 A Well, I'm pretty sure I didn't get on them because
16 the way I worked the plant. I try to keep them set up next to
17 my empties, and I don't get on them unless I have to.

18 Q And you can't really remember one way or the other
19 now; is that correct?

20 A No, I really can't.

21 Q You will recall what you testified to yesterday, and
22 the jury will. But let me ask you something else, the report
23 that you wrote yesterday, which is already in evidence, where
24 was that written? Was it written back at the Aiken depot or
25 where did you write that report on Friday the 23rd?

1 A They had me write that report that Friday night, I
2 believe, when Mr. Burgess, the superintendent, assistant
3 superintendent got down here. And he said just do the best
4 you could.

5 Q Mr. Kirkland, on either Friday the 23rd -- well, let
6 me ask you about Friday the 23 before the first question. Did
7 you ever ask Mr. Chapman or any of the other railroad people
8 to take you to a doctor that day?

9 A No, sir, I didn't ask them.

10 Q On Monday, the 26th, did you ever ask Mr. Chapman or
11 any of the railroad people to take you to a doctor that day
12 and they refused?

13 A Can I answer --

14 Q No, sir. I would like for you to answer, and then
15 of course you can explain. But my question is, did you ever
16 on Monday ask Mr. Chapman to take you to the doctor, yes or
17 no?

18 A No, sir. I didn't.

19 Q Now, when did you see a doctor for the first time;
20 was it on Tuesday morning, the 27th?

21 A Yes, sir. Can I explain or you don't want me to?

22 Q Who took you to the doctor on Tuesday?

23 A Mr. Roberson, the Superintendent of Terminals and
24 Trainmaster, Mr. Chapman.

25 Q Was Mr. Roberson there as part of the group that

1 came out on Friday and did the investigation?

2 A Yes, sir.

3 Q Was he there again on Monday?

4 A No, sir, he was not there on Monday.

5 Q He was there Tuesday?

6 A He was in Columbia, and Mr. Chapman came and got me.

7 Q And Mr. Roberson's title is what?

8 A Superintendent of Terminals.

9 Q Who is Mr. Michael Maher with the Norfolk Southern
10 Railroad?

11 A I have never met him. He is the -- like Roanoke, or
12 he is in Virginia. He is like head of the Rehabilitation
13 Department.

14 Q Now, he is the same gentleman that yesterday
15 afternoon you read us parts of letters that you had written to
16 him; is that correct?

17 A Yes, sir. He writes back and forth.

18 Q Oh, he would write you as well; is that correct?

19 A Yes, sir.

20 Q Do you know what -- he is the fellow, isn't he, that
21 tries to get you back to work with the railroad?

22 A Yes, sir.

23 MR. GARLAND: May I approach the witness, Your
24 Honor?

25 THE COURT: Yes, sir.

1 Q Mr. Garland: Let me show you now some letters that
2 -- let me see if you can identify these. Do you recall
3 getting a letter -- Defendant's Exhibit 12, addressed to you
4 from Mr. Maher dated March 19 of 1999?

5 A Yes, sir.

6 Q Now, does it say in the second paragraph, "although
7 we have not heard from you, I want to again offer you the
8 opportunity to enter Norfolk Southern's Rehabilitation Program
9 as related to you in prior correspondence. There are numerous
10 services we can offer you, the Medical Management Services,
11 and the assignment of a registered nurse to work with you
12 could be especially helpful." Do you remember that?

13 A Yes, sir.

14 Q Do you recall -- did you respond to that letter or
15 do you know?

16 A Yes, sir. I remember talking to him on the phone
17 initially, and then I got into the program. I don't remember
18 the exact dates of entry.

19 Q Those railroad letters that you introduced
20 yesterday, those are the letters that you wrote to him; is
21 that right, Mr. Maher?

22 A Yes, sir.

23 Q Look at this letter, this is dated April 22, '99,
24 Defendant's Exhibit 14, a letter addressed to you by -- or
25 from Mr. Maher; is that right?

1 A Right. Yes, sir. I remember now.

2 Q Now, look at the last paragraph on that first page
3 of that letter, and does it say, "if there are no railway
4 company jobs available with any reasonable distance from your
5 home, I will gladly provide you with the services of an
6 outside vocational counselor"; is that what that says?

7 A Yes, sir.

8 Q Did you request that they provide you at some point
9 with an outside vocational counselor?

10 A Yes, sir.

11 Q Did they do that?

12 A Yes, sir.

13 Q Who was the outside vocational counselor?

14 A Ms. Geneva Bookman with GENEX.

15 Q She is not a railroad employee; is she?

16 A No, sir.

17 Q And you met with her on a monthly basis; is that
18 right?

19 A Yes, lots of time.

20 Q Would she write letters to you and you would write
21 letters back to her?

22 A Yes, sir. Mostly she would call me on the phone.
23 It was not a lot of mail.

24 Q Now, let me show you Defendant's Exhibit 24, a
25 letter of March 20th, 2000, about a year ago. Do you remember

1 getting that letter from Mr. Michael Maher?

2 A Yes, sir.

3 Q Let me ask you to refer, please, to the second
4 paragraph of that letter. Is this what it says to you,

5 "Norfolk Southern's Medical Department informed me that you
6 are medically qualified to return to an alternative clerical
7 position within the company"; is that what that says?

8 A Yes, sir.

9 Q And it says, "there are currently 11 clerical
10 vacancies in the centralized yard office in Atlanta, Georgia;
11 is that what it says?

12 A Yes, sir.

13 Q Did you write back four days later, on March 24th,
14 this letter to Mr. Maher, which is Defendant's Exhibit 25, is
15 that your response to that letter?

16 A Yes, sir.

17 Q And you thanked him for the letter; is that right?

18 A Right. I didn't put in there about the typing,
19 but --

20 Q These are your letters that we are looking at now,
21 Number 20?

22 A Right.

23 Q What does the second paragraph of your letter say?

24 A It says, "as I have indicated to you in my prior
25 conversation and correspondence, I have very strong personal

1 reasons which prevent me from moving from South Carolina to
2 Atlanta, Georgia. Obviously the clerk jobs in Atlanta are not
3 much good to me."

4 Q And you got -- do you recall his letter as dated
5 March 20th, do you remember when you got it, the next day or
6 so after that, you suspect?

7 A The mail -- I don't remember exactly.

8 Q It takes a few days, I guess, to get down there?

9 A Yes, sir. Down where I'm at.

10 Q Then your letter is dated March 24th, so you wrote
11 him back pretty quickly on that, didn't you?

12 A Yes, sir.

13 Q Now, look at this letter --

14 A It says certified mail, I guess that might have come
15 quick, I don't know.

16 Q Look at Defendant's Exhibit 26, please, sir. Now,
17 is that a letter to your attorney copied to you from Mr. Maher
18 dated April 6, 2000?

19 A Right.

20 Q And does that say that you had requested the
21 services of a vocational counselor, and that you are going to
22 engage the GENEX Company to provide vocational assistance to
23 you; is that right?

24 A Yes, sir.

25 Q That was the notice that you received?

1 A Right.

2 Q When, after April 6 -- was it just a month or so
3 after April 6, 2000 that you started working with Ms. Bookman
4 from GENEX?

5 A It wasn't long. I mean, I called the numbers and
6 everything that they gave me, and I got in touch with her as
7 soon as I could.

8 Q Now look at Exhibit 29, which appears to be a letter
9 of January of 2001, just a couple of months ago, written to
10 you by Mr. Maher; do you recall that letter?

11 A Yes, sir. I didn't understand some of it.

12 Q Does the third paragraph say that it is his
13 understanding that you indicated to Ms. Bookman that you were
14 unable to return to a full-time job; is that right?

15 A I never said that.

16 Q Did you ever tell Ms. Bookman that you could only do
17 about 20 hours a week, and that was about all you could --

18 A I told -- I was always honest with Ms. Bookman. I
19 told her all my treatments, the shots that I was taking and
20 the medicine that I was having to take. And I said, you know,
21 right now I am working like 20 hours a week. And she said,
22 well, do you think you are going to be able to get it up to
23 full time. And I said, I think so, I'm trying hard.

24 Q When did you make that statement to her, it's been
25 since January of 2001, hasn't it?

1 A I have been honest with her up front.

2 Q I understand. When did you make the statement to
3 her that you would be willing to accept full time employment,
4 Mr. Kirkland?

5 A I told -- I have applied for full time. I have
6 applied for every job that she has sent me to apply for.

7 Q But when did you tell her that you would be willing
8 to accept full time employment; when was that? When did you
9 make that statement to Ms. Bookman?

10 A I don't understand the question. I never told her I
11 wouldn't. I don't understand the question.

12 Q Is it your testimony that you have never told Ms.
13 Bookman that you could only do about 20 hours a week and you
14 couldn't accept the other jobs because they were full-time
15 jobs, you never told her that at all, anytime?

16 A No, sir, I have been applying. I have 13 in my
17 pocket that I have applied for.

18 Q All right. Look at Defendant's Exhibit 34; is that
19 a letter from January 18th, 2001, from Ms. Bookman to you?

20 A Yes, sir.

21 Q Does it list certain job openings that are
22 available?

23 A Yes, sir.

24 Q Did you respond to Ms. Bookman after receiving this
25 letter?

1 A Yes, sir.

2 Q How did you respond?

3 A By letter.

4 Q Do you have that letter?

5 A Yes, sir. I have got two more letters from her
6 since then, and have them in my --

7 Q You have them with you in your pocket?

8 A Let me see your letter responding to her --

9 THE COURT: What's the number of that one?

10 MR. GARLAND: This is 34.

11 A The Witness: I might have -- I have got two here,
12 but I got one after that. I think this one is responding to
13 jobs -- okay, this one is responding to the three most recent
14 jobs that she gave me. She met me at my doctor's office on
15 February 20th, when I got -- it's in my room, the little
16 sticky -- she met me at my doctor's office when I was getting
17 the shots. This is the one that she sent me -- and a lot of
18 these jobs --

19 Q Oh, that's from you -- may I see that?

20 A Yes, sir. She sent me a list of eight more jobs,
21 and half of them, when I applied, they said I had to have a
22 college -- it said master's degree and marketing degree, and
23 so I wrote her back, and I said, I don't have any degrees.

24 Q So this was written just a week or so ago; is that
25 right?

1 A I can't see the date, I'm sorry.

2 Q March 7th?

3 A That's March 7th to reply -- because see, she wrote
4 me a letter -- see, my first paragraph, if I can read it, it
5 says, "I just wanted to bring you up to date concerning the
6 eight most recent job leads that you sent me in your letter
7 dated February 22. I would like to point out that your letter
8 was not postmarked until March 2nd, and I didn't receive it
9 until Saturday, March 3rd", so it took 10 days for me to get
10 the letter.

11 Q Did you -- one of the leads was to Time Warner; is
12 that right?

13 A Yes, sir, I applied for that job.

14 Q Did you write her anything about that job?

15 A Yes, sir.

16 Q Where is that?

17 A If it's not here, I have it in my other notes. It
18 may be in this one.

19 Q Do you remember --

20 A Do you have a copy of --

21 Q What was the reason you weren't interested in the
22 Time Warner job?

23 A I was interested. I applied for that job, yes, sir.
24 I applied for that job. If I could go to my room, I have
25 all copies of the letters.

1 Q But you remember a specific letter you wrote to Ms.
2 Bookman?

3 A Yes, sir. I have been to Time Warner, it's on
4 Graystone Boulevard in South Carolina, in Columbia, and
5 applied for the job. It was a job of a bill collector for
6 people that weren't paying their cable bill, that's it.

7 Q What reasons, if any, did you give her for not
8 wanting to be interested in that job?

9 A I applied for the job. I said, I didn't know if I
10 would like the job, because, you know, I know what it's like
11 being behind on bills and stuff, and I didn't know if -- how I
12 would feel about calling people and saying, you know, you owe
13 me for your cable bill.

14 Q You told that to Ms. Bookman?

15 A I put in the letter -- but I applied for the job and
16 told them I would take -- they said they had other jobs. And
17 I said, well, you know, I was waiting on them to call me for
18 an interview.

19 Q And when you made the statement, you just meant
20 about knowing people behind, were you making that from a
21 personal observation?

22 A I just know it gets tough, you know, it gets tough.

23 MR. GARLAND: May I approach the bench, Your Honor?

24 THE COURT: Yes, sir.

25 (BENCH CONFERENCE OFF THE RECORD)

1 Q Mr. Garland: Mr. Kirkland, has the railroad done
2 everything that you would have suspected them to do to try to
3 place you in some sort of employment?

4 A Yes, sir, they are trying to work with me about
5 getting employment.

6 Q Do you know the wage rate of the clerkship positions
7 in Atlanta that were offered?

8 A No, sir.

9 Q Did you inquire?

10 A No, sir. I mean, I have got friends that are
11 clerks. I guess -- I never thought about, you know, how much
12 a clerk made.

13 Q There has been no surgery on your back; is that
14 correct?

15 A No, sir. Not yet.

16 Q No surgery on your hand; is that correct?

17 A No, sir.

18 Q You have undergone other types of surgery, have you
19 -- did you last year undergo some type of surgery? Colon
20 surgery?

21 A Not last year.

22 Q When was that?

23 A Just recently, I started developing worser problems.
24 And Dr. Downey, the pain doctor, did like a rectal exam. And
25 I am having a lot of trouble and he thought it was from all

1 this other stuff with the back. And so they have sent me for
2 a colonoscopy, that was a Dr. Keesler.

3 Q What did Dr. Epstein say about that last question?
4 Do you know what he said about it to you?

5 MR. WETTERMARK: Objection, Your Honor, that's
6 hearsay. Dr. Epstein can testify.

7 MR. GARLAND: Your Honor, but he has said what some
8 other doctor -- a hearsay statement from some other
9 doctor, and I think he is entitled to give me an answer
10 if he knows.

11 THE COURT: Just now?

12 MR. GARLAND: He just did.

13 MR. WETTERMARK: I mean --

14 THE COURT: Normally, what the doctor's tell
15 folks would be hearsay. Normally.

16 MR. GARLAND: He just, I think, opened that one up,
17 Your Honor, he just said what Dr. --

18 Q Mr. Garland: And let me ask you this question,
19 maybe it -- did he then refer you to Dr. Epstein for an
20 examination?

21 A Yes, sir.

22 Q What did Dr. Epstein say the cause of that was?

23 MR. WETTERMARK: Objection, that's hearsay.

24 THE COURT: Well, yes, sir, that would be
25 hearsay.

1 MR. GARLAND: It's in his deposition.

2 Q Mr. Garland: Are you telling the jury that the
3 colon problem is related somehow to the back problem?

4 A I don't know.

5 Q Now, did you have any inner ear surgery?

6 A I have a tube in my ear.

7 Q When was that done?

8 A It's been in there about a year.

9 Q Have you ever been, Mr. Kirkland, admitted to the
10 hospital for any sort of chest pains or anything?

11 A Yes, sir, back in -- was it '95, '94, '95?

12 Q Was that in -- where was that?

13 A It was in Myrtle Beach, South Carolina.

14 Q The railroad has told you, have they not, in
15 correspondence and otherwise, that they would pay for any
16 additional educational training that you wanted; is that
17 correct?

18 A Yes, sir.

19 Q Have you requested any from them?

20 A Not at this time, no.

21 Q Has the railroad also told you if you wanted to
22 enroll in any college courses they would pay for that?

23 A Yes, sir. I have been looking into that with Ms.
24 Bookman.

25 Q You haven't done that at this point; is that

1 correct?

2 A No, sir. It would be hard working that job and
3 getting the shots and stuff. But we have been talking about
4 that.

5 Q What job is that now?

6 A The job that I am working.

7 Q Now that's a part-time job; is that right?

8 A No. It's a full-time job, I just work it at my own
9 pace.

10 Q You limit yourself to about 20 hours a week; is that
11 right?

12 A I don't want to. I just --

13 Q You just have to?

14 A -- I just have to.

15 Q Is there any other reason that you limit yourself to
16 the 20 hours?

17 A Just the back pain and the trouble I'm having.

18 Q No other reason other than the pain trouble; is that
19 correct?

20 A That's right.

21 Q Now, I believe you said earlier the railroad before
22 the job offered in Atlanta in March of last year, even before
23 then, the first job was some job in Michigan; is that correct?

24 A Yes, sir, I think Dearborn, Michigan.

25 Q Right. And you said you didn't want to move way up

1 there; is that right?

2 A Right. That's right. I would like to stay in my
3 area.

4 Q Let me make sure I understand your current
5 situation. Are you now working full time or part time with
6 the title checking company?

7 A Well, I don't know how to explain it. The
8 supervisor, Mr. Brannon, he wants me to work as many hours as
9 I can, and I am trying to get it up to a full week.

10 Q What are you up to now?

11 A About 25 hours a week.

12 Q Did you come up from about 20 to about 25?

13 A It was starting like 12 or 15, and then -- and I am
14 just gradually getting to working more.

15 Q And as I understand your testimony, there is no
16 other reason, other than the pain in your back, that would
17 keep you from working a full-time job at that place; is that
18 right?

19 A That's correct. If I understand it correctly. I
20 mean, would he hire me full time, yes. He's -- you know --

21 Q He has offered that, hasn't he?

22 A I have the position, that's what I keep telling Ms.
23 Bookman. I said, you know, I'm applying for jobs that I need
24 a college education and I have got a job.

25 Q And if you could double your work from 20 to 40, I

1 guess, would your salary double, or what would happen?

2 A Well, yes, I guess that's true. You know, I am on
3 an hourly rate.

4 Q Do you anticipate doing that within the next few
5 months? What is your --

6 A Yes, sir. I am trying. Yes, I feel pretty good
7 about it.

8 MR. GARLAND: That's all I have, Your Honor.

9 THE COURT: Any redirect?

10 MR. WETTERMARK: Yes, sir. I just had a few
11 follow-up questions.

12 REDIRECT EXAMINATION

13 BY MR. WETTERMARK:

14 Q Mr. Kirkland, the gentleman asked you about the
15 various railroad safety rules, can you think of anything else
16 that you could have done to try to get the situation with
17 these cars correct?

18 A No, I -- on the --

19 THE COURT: Hold on. We might have an objection
20 here.

21 MR. GARLAND: Your Honor, I object to him leading
22 this witness.

23 THE COURT: Overruled.

24 A The Witness: The rules say that, you know, I must
25 do everything I can. And I didn't want to move the cars. I

1 tried not to move the cars. I reported it to everybody I
2 could report it to, and when they threaten me with my job and
3 get in my face, they overrule that rule. And I said, well,
4 how can I comply with the rule if I am telling you the cars
5 are unsafe and you're tell me I have to pull the cars, so in
6 my mind I didn't break that rule, I am going by that rule.

7 Q Sure. Just out of curiosity, did the safety rules,
8 did they apply to railroad management as well as the people
9 who are out there working every day?

10 A My understanding is they are supposed to, they can't
11 -- they can't mount the cars or step on a rail, you know.
12 They are setting examples -- that would be a bad example if
13 they tell us don't step on a rail.

14 Q The only other thing I want to -- the gentleman
15 asked you about -- like, you have had tubes in your ears, and
16 I think you said you went and had your heart checked out when
17 you had to go to the emergency room with your chest pains did
18 that turn out to be anything?

19 A No, sir. It was fine. Came back and Dr. Jackson
20 did a stress test and that was fine.

21 Q I got you. Tube in your ears, does that keep you
22 from doing anything?

23 A No, sir.

24 Q I think he asked you about ten years ago you were in
25 these car wrecks; did that amount to anything?

1 A No, sir.

2 MR. WETTERMARK: That's all I have, Mr. Kirkland,
3 thank you, sir.

4 MR. GARLAND: Let me ask one follow-up question,
5 Your Honor.

6 THE COURT: Yes, sir.

7 RECROSS EXAMINATION

8 BY MR. GARLAND:

9 Q You testified earlier in your tax returns one of the
10 years you were off about a month; what was the reason for that
11 absence?

12 A It was a disciplinary action.

13 Q It didn't have anything to do with these problems,
14 health problems, is that what you are saying?

15 A No, sir, I don't think so.

16 Q You don't think so? Are you sure of that or who
17 would know if you didn't know?

18 A You are talking for '97?

19 Q I am talking for the time you testified you --

20 A For '97, that was for disciplinary.

21 THE COURT: Is that it?

22 MR. WETTERMARK: Yes, sir.

23 THE COURT: Call your next witness.

24 MR. WETTERMARK: Your Honor, at this time we
25 would call Dr. Eisenberg by video tape deposition.

1 THE COURT: What's his first name? Well, it
2 doesn't matter, I will hear it. Ladies and Gentlemen,
3 you have heard the lawyers, I think, mention in opening
4 perhaps that there would be some testimony from doctors
5 presented by video tape. Just so you will understand,
6 the Rules of Evidence and Procedure do allow a party to a
7 lawsuit to take a deposition, take testimony, from a
8 medical doctor, it can be video tape, this apparently is
9 the case here. The doctor is placed under oath at the
10 time. And the rules allow this to be done, probably for
11 the obvious reason, and not make a doctor come some
12 distance away to Court, so the rules do permit this to be
13 done. You should listen to this testimony just like as
14 if the doctor were sitting here on the witness stand
15 testifying. You may proceed.

16 (AT THIS TIME THE VIDEO DEPOSITION OF DR. RICHARD EISENBERG
17 WAS PLAYED FOR THE JURY)

18 MR. WETTERMARK: Your Honor, at this time
19 Plaintiff would call Mr. Chris Sharpe. We might as well,
20 while they are getting him, we would also at this time
21 offer into evidence Plaintiff's Exhibits Numbers 36, 37,
22 38, 39 and 40, which were the depositions referred to in
23 Dr. Eisenberg's deposition.

24 MR. GARLAND: No objection.

25 THE COURT: They are admitted.

1 CHRISTOPHER JOHN SHARPE

2 Witness having been first

3 duly sworn, testified on

4 DIRECT EXAMINATION

5 BY MR. WETTERMARK:

6 Q Can you tell us your name, please?

7 A Christopher John Sharpe.

8 Q Where do you live, Mr. Sharpe?

9 A 1224 Blackville Court, Gaston, South Carolina.

10 Q Who do you work for?

11 A Norfolk Southern Corporation.

12 Q Mr. Sharpe, are you getting tired of sitting out in
13 the hallway?

14 A Yes, sir.

15 Q How long have you worked for the Norfolk Southern
16 Railroad Company?

17 A This is my 25th year.

18 Q And what is your position with the railroad?

19 A I am currently the 10UPB Utility Man, Columbia,
20 South Carolina.

21 Q What job classification is that? Is that considered
22 a trainman's job, a conductor's job?

23 A That is a trainman's job being paid a conductor rate
24 of pay.

25 Q Have you been either a trainman or a conductor, or

1 in that job classification, your entire career?

2 A I have been both. I am currently a conductor.

3 Q Mr. Sharpe, were you working on the crew with Mr.
4 Kirkland on January 23rd, 1998?

5 A Yes, sir.

6 Q What was the job number that day?

7 A P22PO.

8 Q Is that what is referred to as the Aiken local?

9 A Yes, sir, the Aiken local.

10 Q Who was on your crew?

11 A There was Conductor Lester Kirkland and Mr. Bruce
12 McFarland and myself.

13 Q How long had you been working the Aiken local as a
14 regular job prior to January 23rd?

15 A Six weeks.

16 Q Prior to -- I am not going to ask you to go through
17 this testimony, back at that time was this job something that
18 was available six months of the year to one division and six
19 months of the year to another division?

20 A Yes, sir.

21 Q And when you got on the job six months prior, was
22 that when it first became available to your division?

23 A Yes, sir.

24 Q Prior to this month and a half or so when you worked
25 it regular, had you periodically worked it in the past?

1 A Yes, sir, like all extra employees do, we catch it
2 once in a while. I have been doing it over 20 years.

3 Q Filling in vacancies here and there?

4 A Yes, sir, vacations, off days.

5 Q Do you recall what the weather was like that day?

6 A It was raining.

7 Q What time did y'all get to work?

8 A 7:00 a.m..

9 Q Did you pick up cars from W. R. Grace that day?

10 A Yes, sir.

11 Q Did you see the condition of the cars?

12 A Yes, sir.

13 Q What was the condition of the cars?

14 A They were covered with clay.

15 Q Was that unusual?

16 A No, sir.

17 Q Tell the jury about what percentage of the time that
18 you would get cars out of W. R. Grace that the grab irons and
19 walkways and handholds would be covered with the clay.

20 MR. GARLAND: I object to the form of the question,
21 Your Honor.

22 THE COURT: Overruled.

23 Q MR. WETTERMARK: You can answer it.

24 A Every time we handle the cars they are covered.

25 Q Were you aware of the efforts that had been made to

1 try to get that situation corrected?

2 A Yes, sir.

3 Q Let me ask you just about that month and a half
4 before Mr. Kirkland got injured, what is your best judgment as
5 to how many -- well, let me ask you this. Did you hear him
6 talk to any officials at Norfolk Southern during that period
7 of time trying to get the situation corrected?

8 A The agent, which is an official for us, our
9 immediate supervisor, he reported it to him constantly.

10 Q You heard him do this?

11 A Yes, sir.

12 Q Take us through, generally, and I don't want to go
13 through -- you have not been here, but we have heard a lot of
14 the testimony. W. R. Grace was the first place you switched?

15 A Yes, sir.

16 Q And you got these loaded cars at W. R. Grace?

17 A Yes, sir.

18 Q And then you were able to continue the rest of your
19 switching operations that day?

20 A Yes, sir.

21 Q Eventually where did you and your crew have to take
22 these clay cars that you got from W. R. Grace?

23 A Warrenton, South Carolina.

24 Q And that is a siding off the main line?

25 A Yes, sir.

1 Q What do you do with the cars when you take them to
2 Warrenville?

3 A That is where we classify them.

4 Q How do you classify them?

5 A By switching them.

6 Q In the course of classifying those cars would it be
7 necessary for Mr. Kirkland to have to get on the cars, to tie
8 up handbrakes or knock off handbrakes?

9 A Yes, sir.

10 Q And did you all switch these cars at Warrenville
11 that night or that afternoon?

12 A Yes, sir.

13 Q On that Friday did you see Mr. Kirkland when he fell
14 off the car?

15 A No, sir.

16 Q Were you in a position where you could see him?

17 A No, sir.

18 Q How did you first learn that he was injured?

19 A We were starting back up the hill going back to
20 Aiken and we had lined up the switches and everything to
21 leave, he informed me that he had fallen off the car and hurt
22 himself.

23 Q Did you, I say inspect him, that is not the word,
24 did you check him out or did he ask you to check him out?

25 A Not at that time, no, sir.

1 Q Did he a little bit later?

2 A Yes, sir, on the engine I did.

3 Q Tell us what you saw.

4 A He was gripping his hand like this, you know, like
5 when you hit your hand and it goes numb, or whatever, he was
6 going like this. He said my hand hurts, my back hurts, you
7 know, but he kept doing that. And you could see his hand was
8 getting big, and it looked like the thumb had moved backwards,
9 you know, and that is when I knew he was hurt.

10 Q Did you actually look at his back?

11 A Yes, sir. He pulled his shirt up and showed me his
12 back.

13 Q What did you see when you looked at the back?

14 A Just like any time you fall and you get red marks.
15 He had fallen across the rocks and stuff and you could see the
16 little dents from the rocks and everything, it had started
17 discoloring a lot.

18 Q After he got on the engine, and told you he was
19 hurt, where did you all go next?

20 A Went straight to the depot to let him off.

21 Q Did he get off at the depot?

22 A Yes, sir, we helped him. We got him off the engine,
23 he went into the depot.

24 Q And what did you and the engineer do?

25 A We went and put the train up.

1 Q Finished up your work?

2 A Yes, sir.

3 Q When you got to the depot can you tell us basically
4 what happened when you got to the depot?

5 A Come in the depot, Mr. McFarland and myself. Mr.
6 Kirkland informed us that he had called and reported the
7 injury, and we were told to stay there until the officials
8 arrived.

9 Q Did you do that?

10 A Yes, sir.

11 Q How long did it take before the officials arrived?

12 A I would say around two hours we sat there.

13 Q And tell us who arrived first and then tell us the
14 order that they arrived, to the best of your recollection.

15 A I believe Mr. Chapman was the first one there; and
16 then came Mr. Roberson, and somebody with him; and then Mr.
17 Burgess; Mr. Marcum. It was -- it was a room full of
18 officials.

19 Q What happened when they all got there?

20 A Well, when they got there they kind of stood around
21 a little but until Mr. Burgess got there.

22 Q He was the big boss?

23 A He is the boss. He is the Assistant Division
24 Superintendent. And a couple of them asked how are you doing,
25 Lester, like that. He says I am hurting. And so they just

1 stood there. And Mr. Burgess came in and he told Mr.
2 Kirkland, you know, to trust him, that he knew about bruises
3 and that he had bruised himself badly and that is when he
4 instructed one of the officials to get a bag of ice to put on
5 his back. Got him a chair and put the bag of ice behind his
6 back and put a bag to his hand. And Mr. Kirkland said my head
7 and neck are hurting too, you know, and they went and got him
8 Tylenol. And then that time, that is when I got a little -- I
9 took exception to the when they started calling each other
10 doctor. Dr. Burgess, Dr. Roberson, stuff like that. And I
11 felt -- I took exception to that.

12 Q Was there discussion by the officials to Mr.
13 Kirkland concerning the reportability of the injury and going
14 to doctors?

15 A They wanted to wait. They wanted him to wait.

16 Q Why? Did they say why?

17 A Well, they just don't want reported injuries. They
18 call them FRA, reportable injuries.

19 Q Did Mr. Kirkland, was he agreeable to working with
20 them?

21 A Yes, sir.

22 Q How long were you all there?

23 A Well, we are only allowed to work 12 hours, so it
24 was getting close to 7:00 o'clock. I guess we were there a
25 good five or six hours before they had to release us and tell

1 us to go on home.

2 Q They sent you and the crew home?

3 A They sent Mr. McFarland and myself, we left.

4 Q Was Lester still there when you left?

5 A Yes, sir, he was still there.

6 Q Any discussions about the condition of the cars?

7 A He -- Mr. Burgess told one of the officials, I am
8 not sure which one, to go to Warrenville and look at the cars.

9 Q Was there any discussion about checking out the
10 situation at W. R. Grace?

11 A I was taken outside by Road Foreman Marcum and asked
12 a few questions, so I don't recall what was said inside. I
13 don't know that.

14 Q Fair enough. When was your next work day?

15 A Monday morning.

16 Q And did you go to work Monday morning?

17 A Yes, sir, 7:00 a.m..

18 Q Mr. Kirkland come to work?

19 A Yes, sir.

20 Q How was he doing that early morning?

21 A He was hurting.

22 Q When you all first got to work did you all wait?
23 Were you looking for someone to join you there?

24 A When I showed up Mr. Kirkland told me we were
25 supposed to meet Mr. Chapman at 7:00 a.m. to go to the clay

1 mines.

2 Q Did he arrive at the depot before you all started
3 working?

4 A No.

5 Q What happened after you all -- Monday when you all
6 took off and started working, tell us what happened after
7 that.

8 A We got the cars for the clay mines, and we developed
9 engine problems. So we broke down prior to getting to them at
10 a main crossing. We were waiting for the shop people out of
11 Augusta, Georgia to come and work on the engine. Well, Mr.
12 Chapman came on the radio and told Lester, Mr. Kirkland, that
13 he would meet us at the crossing. He met the engine and him
14 and Mr. Kirkland got out and left.

15 Q Where were they going?

16 A They were going to W. R. Grace.

17 Q How long were they gone?

18 A I would say at least an hour or two, maybe. Some --
19 it was a long time, because they had to wait on the shop man
20 to come from Augusta, to get there and fix the engine.

21 Q When you say it was an hour or two, were they gone
22 an hour or two or does it just take an hour or two to fix the
23 engine?

24 A It was about an hour or two to fix the engine plus
25 start moving again. You know, I don't really know how long

1 they were gone, because just sitting there waiting on
2 everything to take place.

3 Q Well, that's fine. Just tell us if you are not
4 sure. Eventually were you able to get your engine fixed?

5 A Yes, they fixed the engine.

6 Q And where did you go after the engine was fixed?

7 A Went straight to W. R. Grace.

8 Q Tell us what happened when you got to W. R. Grace.

9 A At W. R. Grace we went into -- we rode a train to
10 begin our switching, went in there, and there it was again,
11 they were covered.

12 Q How badly were they covered?

13 A They were covered bad.

14 Q I mean

15 A There was almost a half inch of clay on the grab
16 irons, at least a inch of clay on the crosswalks, handbrakes
17 had it all in the spokes and on top of them. There was almost
18 a foot inside the cars and at least two to three feet of it on
19 top of the cars.

20 Q It was covered --

21 A They were covered.

22 Q What happened? What did Mr. Kirkland do when he
23 saw them?

24 A Well, he got upset and said we are not going to
25 switch this way, because somebody -- you know, somebody is

1 going to get hurt there, doing this. He called Mr. Chapman
2 again on the radio. He did not get a response, so he called
3 dispatch to get Mr. Chapman. And they got in touch with him,
4 and then Mr. Chapman come over the radio and said for us to
5 wait there, he would meet us at W. R. Grace.

6 Q Did Mr. Chapman come out and meet you at W. R.
7 Grace?

8 A Yes, he did.

9 Q And tell us what happened when he got there.

10 A Well, him, Lester, the plant supervisor, David
11 Woods, and myself were standing there and we were discussing
12 about the dirtiness of the cars and everything. And he looked
13 at -- they went on, you know, because I am not -- I am just a
14 brakeman on the job, so I don't really pay attention to the
15 argument about the cleanliness of the cars. I just stepped
16 aside a little bit, but I did -- you know, I am standing there
17 and then all of a sudden Mr. Chapman tells Lester, he says,
18 Lester they are a good customer, we have got to switch them.
19 Switch them, so we switched it.

20 Q After he told you all to switch them what did he do?

21 A He left.

22 Q You took the cars with all the clay on them?

23 A Oh, you -- we left, yeah. We left with the cars.
24 We went to Aiken.

25 Q When you got to Aiken what move did you have to

1 make?

2 A We were going to run around a train, so we stopped,
3 got down and tied the cars off. To tie them down you have to
4 -- according to the rules you have to tie your cars down
5 before you cut the engine off. We were tying the cars down.
6 I got my brake on first and I was walking up and Mr. Kirkland
7 was putting his on.

8 Q What type of car was he putting his brake on?

9 A On a covered hopper, like in that picture right
10 there.

11 Q One of the W. R. Grace cars?

12 A Yeah, it came out of W. R. Grace, yes.

13 Q Tell us what you saw when Mr. Kirkland was up there
14 trying to put the handbrake on.

15 A Well, he was putting the brake on and when he cut
16 that last little bit he slipped, and when he slipped he
17 twisted real hard. And I saw that tear come out of the corner
18 of his eye. I knew then that this was no joke, this boy was
19 hurting.

20 Q Was he able to get off the car?

21 A No, sir. I helped him off that car.

22 Q And where did you take him?

23 A Straight to the depot.

24 Q Did you all call somebody?

25 A Yes, sir. We called Mr. -- I called the dispatcher

1 and they got in touch with Mr. Chapman.

2 Q Did he come?

3 A Yes, sir, he did.

4 Q Tell us what happened when he got there.

5 A Well, when he got there he came to the door and he
6 said -- well, do you want me to tell you the exact words he
7 said?

8 Q Say the exact words.

9 A He said this is a bunch of shit, like that you
10 know. And he didn't say it softly, he was upset, because this
11 is his third time he done seen us today on the same thing.

12 Q So what happened then?

13 A Well, he told me to go out there and finish the
14 switching, him and Lester did some talking. I got a train
15 ready to go down the hill. Mr. Kirkland informed me that he
16 was instructed to line up a relief crew for us when we went
17 down the hill. And then I got on the engine and waited for
18 Mr. Kirkland.

19 Q Now, these cars that Mr. Kirkland got hurt on on
20 this day, were they part of the cars that you all were taking
21 down the hill?

22 A They were the cars we were to take down the hill.

23 Q To do what with?

24 A Put them off on the side for somebody else to pick
25 them up.

1 Q And were they still in the same clay covered
2 condition?

3 A Yes, sir, they were.

4 Q And I can't remember, were you there during the
5 conversation between Mr. Kirkland and Mr. Chapman about the
6 advisability of putting those cars on another train?

7 A Yes, sir.

8 Q Tell us what you heard.

9 A Lester told them what about, you know, somebody
10 slipping and falling, and all this good stuff, and he said let
11 me worry about that.

12 Q And he instructed you all to take the cars anyway?

13 A Yes, sir.

14 Q How much after that was Mr. Kirkland able to stay on
15 the job? How long did he stay on the job?

16 A Well, we finished up that day, which with a relief
17 crew, they came and relieved us, and that was the last day Mr.
18 Kirkland worked.

19 Q Was he able to any further work?

20 A Because I didn't let him work, I didn't let him do
21 anything. You know, I didn't want him to do anything. I
22 could handle the rest of the day. He just did paperwork and
23 that was it.

24 MR. WETTERMARK: Mr. Sharpe, that is all I have.
25 This gentleman may have some questions.

1 THE COURT: Mr. Garland?

2 MR. GARLAND: May it please the Court?

3 THE COURT: Yes, sir.

4 CROSS EXAMINATION

5 BY MR. GARLAND:

6 Q Mr. Sharpe, on the Monday you have just been talking
7 about, where was the slipping that you observed, was it at W.
8 R. Grace and Company, this slipping by Mr. Kirkland, or was it
9 down at near the Aiken Depot?

10 A It was at the Aiken Depot, sir.

11 Q Did you see him? Did anybody climb up on the car at
12 the Grace Company or did you just couple them together?

13 A We just coupled them together.

14 Q You saw him earlier Monday morning?

15 A Yes.

16 Q Did he seem to be okay or in pain or what?

17 A He was in pain.

18 Q Did you volunteer to take the brakes off for him
19 that day?

20 A Yes, sir.

21 Q Could you tell me why he was up there, then, if you
22 volunteered to do that? Were you just down looking at him?

23 A No, sir. I don't quite understand your question.

24 Q Well, you tell me that he says he is in pain.

25 A Yes.

1 Q There's a brake to be taken off, but he is up there
2 taking it off; is that right?

3 A No, sir. I didn't say he was taking off any brakes.

4 Q What was he doing up there?

5 A He was applying the brakes.

6 Q Applying the brakes. Okay, why was he up there to
7 begin with, in other words, why didn't you go up there?

8 A Because Mr. Kirkland is a conscientious employee,
9 that is part of his duties and he was there.

10 Q And you were standing there watching him?

11 A No, sir. I said I was tying on mine, my brake
12 first, and I walked up and he was tying his on.

13 Q Was it raining on Monday?

14 A No, sir.

15 Q Do you recall, Mr. Sharpe --

16 MR. GARLAND: May I approach the witness, Your
17 Honor?

18 THE COURT: Yes, sir.

19 Q MR. GARLAND: -- Giving a statement to Mr. J. D.
20 Hollis, Claims Agent for Southern Railway?

21 A I remember having a meeting with him.

22 Q On February 13th or 8th?

23 A I guess, if that is the date it says, yes.

24 Q That was just about a couple of weeks after the
25 event?

1 A I guess. You have got the dates there, I don't
2 know.

3 Q Let me ask you if you remember telling him --

4 MR. WETTERMARK: May I look over your shoulder?

5 MR. GARLAND: Yes.

6 Q MR. GARLAND: Asking about -- let me ask you this,
7 you talked about Trainmaster Chapman being out there and
8 having these conversations on Monday of that week; is that
9 right, Monday the 26th?

10 A Yes, sir. Three conversations.

11 Q Look at this question and answer, please sir.
12 Talking about page five here, you are going through talking
13 about on Monday the 26th, right, about how you watched him
14 slide?

15 A Slip and slide.

16 Q And then you recall the question, "so Mr. Chapman,
17 the trainmaster, was he out there that day looking, wasn't
18 he"? And what did you say?

19 A "I don't know." Are you talking about was he out
20 there when he slid, I don't know if he slid or not.

21 Q Was he out there on the 26th?

22 A Out there where?

23 Q I don't know. And then you said -- "what was the
24 weather like on the 26th, that was a Monday?". And what did
25 you say?

1 A "It was raining a little bit."

2 Q Well, was it raining or was it clear?

3 A I don't know. Tell you the truth, I don't remember
4 that well.

5 Q And how about, was Mr. Chapman out there or was he
6 not out there?

7 A He was there, sir.

8 Q And why did you not tell Mr. Hollis what you have
9 just said, why did you say you didn't know whether he was even
10 there or not if he was there and you heard --

11 A I don't know what you are asking here, sir. I mean,
12 you are saying if I made these statements. I don't recall
13 making these statements.

14 Q There is a tape of this here, would you like for me
15 to play it for you?

16 A Yes, sir, play the beginning of it.

17 Q Are you saying to me that you didn't make the
18 statement when he asked you if Mr. Chapman came out there --

19 A If it's in that tape and you have a tape of it then
20 I must have said it.

21 Q Now, were you telling the truth then or did you know
22 whether he came out there or not, or are you telling the truth
23 today?

24 A I just swore to God that I would tell the truth now.

25 Q So can you give us an explanation why you didn't say

1 this to Mr. Hollis?

2 A I have not -- well, now I see why I said I didn't
3 want to record it, I would make a mistake like that.

4 Q You and Mr. Kirkland have been there for a long
5 time; is that right?

6 A I have known Mr. Kirkland for a long time, yes, sir.

7 Q And have you ever held a conductor's job on a train?

8 A Yes, sir. I am currently a conductor.

9 Q Did you, at that time, take exception and say we are
10 not going to move these cars, on the 26th?

11 A I am not -- I wasn't the conductor on the job, no.

12 Q Had you been the conductor would that have been
13 something that you could have done if you had wanted to?

14 A I would have acted just the same as Mr. Kirkland
15 did.

16 MR. GARLAND: That's all.

17 THE COURT: Any redirect?

18 MR. WETTERMARK: Hang on one second, please.

19 REDIRECT EXAMINATION

20 BY MR. WETTERMARK:

21 Q Have you ever seen this before?

22 A No, sir.

23 Q The questions right before he asked you if Mr.
24 Chapman was out there, let's just start here, will you read
25 those questions, please?

1 THE COURT: Read them out loud?

2 MR. WETTERMARK: Yes, sir.

3 A The Witness: Which ones, sir?

4 Q Let's start right here. This is talking about
5 Monday the 26th is that right? Read that for us.

6 A All right. "He almost fell and caught himself and
7 wrenched himself real good, I mean twisted himself real good."

8 Q And read the next question.

9 A "Was he trying to take off take the brake off, put a
10 brake on or what? You know, I believe he was just trying to
11 cross over to get down, I am not sure about the brake. You
12 are not sure about that? No, I just saw him fall, slip.
13 Slip, fall, whatever you want to say, however you want to say
14 it."

15 Q The next question.

16 A "He didn't fall off the car, did he? No, he didn't
17 fall all the way off the car on that day."

18 Q Keep going.

19 A "Did you help him off the car? No. By the time I
20 got to him he done got down and he complained about really
21 jerking."

22 Q And then the next question.

23 A "So Mr. Chapman, the trainmaster, was out there that
24 day, wasn't he? I don't know. Okay, you don't know about
25 that? Uh-uh. (Negative)."

1 Q When he asked you that question was Mr. Chapman out
2 there, what was your --

3 A My understanding --

4 THE COURT: Wait, wait, wait. One at a time.
5 One at a time.

6 Q MR. WETTERMARK: Let me ask this. When Mr.
7 Kirkland fell off the car was Mr. Chapman out there?

8 A No, sir.

9 Q Fair enough, thank you, sir.

10 THE COURT: Is that it for this witness?

11 MR. WETTERMARK: Yes.

12 THE COURT: May he be excused?

13 MR. WETTERMARK: Yes, sir.

14 THE COURT: You may be excused.

15 MR. WETTERMARK: At this time we took a follow-up
16 deposition of Dr. Eisenberg, and I would like to play it
17 now, Your Honor, it's just a 15-minute deposition. Dr.
18 Eisenberg's first deposition, which was just played a
19 minute ago, was taken in March of 2000 and then nine
20 months later, in November of 2000, we took his follow-up
21 deposition.

22 (AT THIS TIME THE FOLLOW-UP VIDEO DEPOSITION OF DR. RICHARD
23 EISENBERG WAS PLAYED FOR THE JURY)

24 MR. WETTERMARK: The Plaintiff calls Mr. Tommy
25 Conley.

1 THOMAS WESLEY CONLEY

2 Witness having been first

3 duly sworn, testified on

4 DIRECT EXAMINATION

5 BY MR. WETTERMARK:

6 Q Tell us your name, please.

7 A Thomas Wesley Conley.

8 Q Where do you live?

9 A Wrightsville, South Carolina.

10 Q Who do you work for?

11 A Norfolk Southern Railway.

12 Q What is your job with the railroad?

13 A A locomotive engineer.

14 Q How long have you worked with the railroad?

15 A Almost 24 years.

16 Q Were you working with Lester Kirkland and Tommy

17 (sic) Sharpe on Monday, January 26th, 1998?

18 A Yes, sir, I was.

19 Q And what was your position on that crew?

20 A Locomotive engineer.

21 Q Was that your regular job?

22 A No, sir, it was not.

23 Q Why were you on that job that day?

24 A The regular engineer was off on vacation and I was
25 working his vacation.

1 Q Now, we have heard testimony here about on Friday
2 the 23rd an incident involving Mr. Kirkland, you were not on
3 the job that day?

4 A No, sir, I was not.

5 Q You came to work that Monday morning for the first
6 time on this particular job at that time?

7 A Yes, sir.

8 Q Tell me what you recall when you first got to work
9 that morning. What do you recall about Mr. Kirkland's
10 situation?

11 A When I got there they told me Mr. Kirkland had
12 gotten hurt on Friday before, and that is all I knew about it,
13 that he had gotten hurt.

14 Q So you heard some conversations about what had
15 happened the previous Friday?

16 A Yes, sir, I have.

17 Q When you all first got to work tell us what
18 happened. If you would, take us through what you remember
19 that day.

20 A When we got to work we went out and cranked the
21 engine and went to get straight to go. And you could tell, I
22 talked with the conductor, and he -- you know, you could tell
23 he was -- looked like he was a little stoved up and sore. And
24 he told us what all we were going to do. And we went out and
25 got the engine and come out to do our normal work, switching

1 cars out to go to work some industries.

2 Q Where was your first scheduled stop for that day?

3 A First scheduled stop was W. R. Grace.

4 Q And as you all went from the Aiken Depot towards W.
5 R. Grace tell us what happened with your engine.

6 A Well, I had some engine trouble and I couldn't get
7 the engine to load. And we had to get the shop to come to
8 work on the engine.

9 Q Where did you stop?

10 A It was a crossing just before you got to W. R. Grace
11 on the bypass, I believe it was.

12 Q Do you recall how long you were stuck there waiting
13 on the engine to be fixed?

14 A Probably about an hour, or better.

15 Q Tell us what you remember happening while you were
16 there waiting for the engine to be fixed.

17 A The trainmaster was in the area and had called us on
18 the radio. And he came to the engine and talked with us, and
19 him and -- he and Mr. Kirkland got in his car and went -- and
20 left while we were waiting.

21 Q How long were they gone?

22 A Probably -- to my recollection it was probably a
23 half hour or so.

24 Q And after Mr. Kirkland got back and after your
25 engines were fixed where did you and your crew go?

1 A We left and went to W. R. Grace.

2 Q Can you tell us what you remember happening at W. R.
3 Grace that morning?

4 A We went to W. R. Grace and we rolled the cars by, as
5 was normal for us to do at that point, and we got everything
6 together and then went into the plant.

7 Q And then what happened after you went into the
8 plant?

9 A We got everything coupled together and the conductor
10 and all was in the plant and said that -- just to sit where we
11 were, that he wanted me to call the trainmaster on the radio,
12 that we were not going to move the cars and he wanted to talk
13 with the trainmaster.

14 Q Let me figure out, let me -- if I could, I would
15 like for you to try to explain where you were located and
16 where Mr. Kirkland was located. First of all, were you still
17 on the locomotive engine?

18 A Yes, sir, I was.

19 Q How far would you have been, when you were on the
20 locomotive engine, to where Mr. Kirkland was down in the
21 plant?

22 A Probably seven or eight car lengths.

23 Q And how much in feet is that? Translate that to
24 feet.

25 A Probably 5, 600 feet, maybe.

1 Q When you were on the locomotive engine you could not
2 see what was going on where Mr. Kirkland was?

3 A No, sir, I could not.

4 Q I think you said that he called you and asked you to
5 contact the trainmaster?

6 A Yes, sir.

7 Q He called you on his radio?

8 A Yes, sir, he did.

9 Q Did you try to contact the trainmaster?

10 A Yes, sir, I did.

11 Q How?

12 A By radio.

13 Q And were you able to get in touch with him?

14 A No, sir, I was not.

15 Q Tell us what you did then.

16 A I called Mr. Kirkland back on the radio and told him
17 I was not able to get the trainmaster, did not hear him on the
18 radio at all.

19 Q And what did he do?

20 A He told me he would go and call the dispatcher.

21 Q Call the dispatcher?

22 A Yes, sir.

23 Q Could you have called the dispatcher on your radio?

24 A Yes, sir, I could have.

25 Q Can you also reach these people by land -- I call

1 them land lines, but by old fashioned telephone?

2 A Yes, sir, you can.

3 Q After Mr. Kirkland told you he was going to contact
4 the dispatcher tell us what happened after that.

5 A We just -- I sat on the engine to wait and I heard
6 the radio, the dispatcher calling the trainmaster on the
7 radio.

8 Q And did the trainmaster eventually get there?

9 A Yes, sir, to my knowledge he did.

10 Q Which trainmaster?

11 A Trainmaster Chapman.

12 Q You are still sitting on the engine?

13 A Yes, sir.

14 Q Did you ever get off the engine and go back?

15 A No, sir.

16 Q You don't have any knowledge about what was said or
17 happened back inside the plant while Mr. Chapman was there?

18 A No, sir.

19 Q What was the next thing that happened as far as
20 communications from Mr. Kirkland on the ground end?

21 A The next thing that happened was I was told to
22 switch the cars, to pull the cars out.

23 Q And did you all pull those cars out?

24 A Yes, sir.

25 Q Did you ever see those cars that day?

1 A Yes, sir, I did.

2 Q Tell us what their condition was.

3 A They had clay on them.

4 Q Where did you take those cars?

5 A To the depot at Aiken.

6 Q What move were you all going to make at the Aiken
7 Depot?

8 A We were going to get other cars to go work the other
9 plants and run around the cars there.

10 Q Did you see Mr. Kirkland when he slipped on the car
11 there at the Aiken Depot?

12 A No, sir, I did not.

13 Q When did you first see him after that happened?

14 A When I -- after he had the cars already tied -- he
15 was down on the ground already with the brakeman, and I came
16 down there and he told me to come to, you know, the office.
17 And I got off the engine, got the engine tied down and went to
18 the office where he was at.

19 Q I am sorry, you went to where?

20 A To the depot.

21 Q With Mr. Kirkland?

22 A Yes, sir.

23 Q When you got to the depot what happened?

24 A He was on the telephone trying to call -- I think he
25 called the trainmaster, I am not sure. Called the dispatcher

1 to call the trainmaster, I am not sure exactly, but he was on
2 the telephone.

3 Q Did anybody come to the depot?

4 A Yes, sir, they did.

5 Q Who?

6 A Trainmaster.

7 Q Trainmaster who?

8 A Chapman.

9 Q And what happened when he got there?

10 A When he got there we told him what had transpired,
11 Mr. Kirkland getting hurt, slipping. And we were told to take
12 the cars, to move the cars to Warrenville.

13 Q Did Mr. Kirkland take exception to that?

14 A Yes, sir, he did.

15 Q How so?

16 A He said that the clay was all over everything, you
17 know, that we needed to do something about it before somebody
18 else got hurt.

19 Q And what was Mr. Chapman's response?

20 A He said don't worry about that, that he would take
21 care of that.

22 Q And did you and your crew take these cars?

23 A Yes, sir, we did.

24 Q Put them on the siding at Warrenville?

25 A Yes, sir, we did.

1 Q Were they cleaned up before they were put on the
2 siding?

3 A No, sir, they were not.

4 Q Before you -- let me back you up, I got out of
5 order. When Mr. Chapman said that he would handle that did he
6 stay around after that or did he leave?

7 A No, sir, he did not, he left.

8 Q After he left what did Mr. Kirkland do?

9 A He called on the telephone. He got on the telephone
10 and made a telephone call.

11 Q Do you know who he was calling?

12 A I think he called the agent that takes care of
13 Aiken, Augusta.

14 Q At some point in time did he -- did his wife come
15 out there?

16 A Yes, sir, they did.

17 Q And what did she do when she was there?

18 A They took some pictures of the cars that he slipped
19 on and I think the engine and also his clothes and stuff as
20 well.

21 MR. WETTERMARK: That is all I have, thank you.

22 THE COURT: Mr. Garland?

23 MR. GARLAND: Your Honor, I just have a couple of
24 questions. May I ask from right here?

25 THE COURT: Yes, sir.

CROSS EXAMINATION

BY MR. GARLAND:

Q Mr. Conley, do you recall there was a derailment that day, Mr. Chapman left for a derailment?

A No, sir. I don't recall whether it was a derailment. I think they said something about a crossing accident, I am not sure.

Q Do you know where that was?

A No, sir, I do not.

Q And do you recall that was why he left?

A Yes, sir. I said he was leaving, that is what -- I think I said that.

Q Back at the Grace plant, do they Grace employees, are they the ones that blow the kaolin off of the cars?

A I think so, yes, sir.

Q So you are up in the engine when all that is going on, right?

A Yes, sir.

Q Do you know, of your own knowledge, whether or not that is usually done by the Grace employees or done by the railroad crew?

A To my knowledge it is done by the Grace people. I don't --

Q Have you ever had occasion to talk with either Mr. Woods -- do you know Mr. Woods, the plant manager there?

1 A No, sir, I do not.

2 Q Have you ever talked to anybody at Grace and Company
3 about any problem with the Kaolin on the cars?

4 A No, sir, I have not.

5 Q You have never talked to Mr. Chapman about it, have
6 you?

7 A No, sir, I did not.

8 MR. GARLAND: That is all I have.

9 THE COURT: Is that it?

10 MR. WETTERMARK: Thank you, Mr. Conley. May we
11 approach for a second?

12 THE COURT: Yes, sir. Excuse us just a moment.

13 (BENCH CONFERENCE OFF THE RECORD).

14 (JURY LEAVES COURTROOM).

15 THE COURT: Okay, the Jurors are out. Mr. Garland,
16 you and --

17 MR. GARLAND: Your Honor, let me tender -- I think
18 I tendered Defendant's Exhibits 3, 4 and 5, but also the
19 ones identified by Mr. Kirkland, Defendant's Exhibit 34,
20 29, 30 --

21 THE COURT: Wait a minute. Those numbers don't
22 correspond to my notes, how about yours?

23 THE REPORTER: I have got 34, 29, 25, 12 and 14 that
24 have been --

25 MR. GARLAND: 26?

1 THE REPORTER: And 26.

2 THE COURT: I have 12, 14, 20, 25, 26, 34.

3 MR. WETTERMARK: Exhibit 25?

4 THE REPORTER: 25.

5 MR. GARLAND: 24, 14?

6 THE REPORTER: I don't have 24.

7 THE COURT: I did not have 24. You didn't use
8 them all, I don't think, that you had in your hand. But
9 which ones do you have?

10 THE REPORTER: I have 12, 14, 25, 26, 29 and 34.

11 MR. GARLAND: You are right. I think this is --
12 that's right, 28 was not used. 34 you have?

13 THE REPORTER: Right.

14 MR. GARLAND: 25?

15 THE REPORTER: Right.

16 MR. GARLAND: 24?

17 THE REPORTER: No.

18 THE COURT: I didn't have a 24.

19 MR. GARLAND: 24 was the one that he identified
20 about the letter --

21 THE REPORTER: So put it in?

22 THE COURT: Sometimes I was not clear if you said
23 an exhibit number to take a letter --

24 MR. GARLAND: It was the March 20th, 2000 letter is
25 the exhibit. There might have been another that you --

1 THE COURT: I had that Exhibit 20 was March the
2 20th, but I might have written it down wrong.

3 MR. GARLAND: I might have misstated, but it is the
4 March 20th, 2000, letter is the Exhibit 24 letter from
5 Mr. Maher to Mr. Kirkland.

6 THE COURT: That was 24. I had the March 20th
7 letter was shown to me. But that's Exhibit 24?

8 MR. GARLAND: That is Exhibit 24.

9 THE COURT: All right, well it is 12, 14, 24, 25,
10 26, 29, 34.

11 MR. WETTERMARK: Show me the ones that you are
12 offering.

13 MR. GARLAND: 25, that was one of them. 26, 34,
14 29, 30 --

15 THE COURT: I did not have 30.

16 MR. GARLAND: I will identify that with another
17 witness. 14, 26 and 12.

18 MR. WETTERMARK: I do not have any objections,
19 except for 26 is highlighted, we need to --

20 MR. GARLAND: Oh, yes. Let me get another copy of
21 that.

22 MR. WETTERMARK: We need to get an unhighlighted
23 copy. But subject to that I do not have any objections
24 to those exhibits.

25 THE COURT: Admitted with the understanding that

1 that one exhibit that is highlighted will be substituted
2 with one that is not highlighted.

3 MR. GARLAND: Got you. We will do that. Can I
4 also perfect the record on our side bar?

5 THE COURT: Yes, sir, you may.

6 MR. GARLAND: I had asked -- I was in the process
7 of cross examining the Plaintiff and he had indicated
8 that the had written a response to Ms. Bookman concerning
9 a job at Tiwana Company. It was a letter that he had
10 written her dated February 6th, 2001. He testified about
11 this letter, and then said that -- when asked why he did
12 not pursue that job he said that was a bill collecting
13 job. He read from this letter, it said, since I have
14 been out of work I remember first hand some of the
15 difficulties people encounter in paying their bills on a
16 timely basis. Understanding that was a job of collecting
17 debts. I then, because of the earlier ruling by Your
18 Honor on the Motion in Limine, instructed me not to
19 mention the fact that this Plaintiff is drawing 1900 and
20 some odd dollars a month railroad disability payment. We
21 approached the bench for a side bar and said that in my
22 opinion this was a different issue, he had opened the
23 door now to his financial condition in that he had put it
24 into evidence by making a statement like that to the
25 jury. And I then -- I would have proffered the evidence,

1 I would have then asked him, well, isn't it true, though,
2 Mr. Kirkland, that you are receiving monthly, and have
3 been now for well over a year, \$1,973 a month in railroad
4 disability payment. And he would have said yes. And I
5 would have said, is it further conditioned that if you
6 work in excess or make in excess of \$400 that that
7 payment will be reduced by the amount over that that you
8 make, if you agree that those were the conditions. And I
9 think also that would be relevant for impeachment
10 purpose, because I specifically asked him if there was
11 any other reason, other than his back pain, that he
12 couldn't work any more hours or earn any more. So I make
13 that proffer of evidence if it please the court.

14 THE COURT: Okay. Anything, Mr. Wettermark, you
15 want to add to that perfecting of the record by Mr.
16 Garland?

17 MR. WETTERMARK: No, sir. Thank you, Your Honor.

18 THE COURT: Okay. And I, at the side bar, ruled
19 that, in my judgment, he had not opened the door, that
20 all he had said was he had some reluctance to being a
21 bill collector. He did not say, as I heard his
22 testimony, that he was having financial problems that
23 prevented him from paying his own bills, in which case we
24 would have had something different in my view. I
25 understand where you were coming from on the law you

1 wanted to make reference to. I mean, the concept is
2 probably straight forward. I just did not feel like what
3 he testified to was in that category, so I declined to
4 let you go into that. And that is my ruling and that
5 will stand.

6 MR. WETTERMARK: One other matter of
7 housekeeping. Is it okay for all the witnesses who have
8 testified so far, are they all released to go back home?

9 MR. GARLAND: They are all released to go.

10 THE COURT: As long as you all are comfortable
11 with that, that is fine with me. We will resume at 1:15.
12 Are there any other matters you anticipate coming up this
13 afternoon? It has been going very smoothly, but just to
14 look ahead. I think the only issue I had made a note
15 about was perhaps on your getting into Mr. Walls's W-2.
16 I don't know if --

17 MR. WETTERMARK: That is this afternoon.

18 MR. GARLAND: That will be an issue, Judge.

19 THE COURT: Well, you plan to call Mr. Walls as a
20 witness, I take it?

21 MR. WETTERMARK: I do.

22 THE COURT: And Mr. Garland is going to object
23 and so we have already talked about it. Anything more to
24 clarify that matter?

25 MR. WETTERMARK: No. I mean, I have double

1 checked with Mr. Walls and I will have him testify to
2 what the Newberry switcher job pays. I am going to try
3 to do it two ways, have him tell us what the biweekly pay
4 of that job is and then show what he was able to make on
5 that job working a whole year.

6 MR. GARLAND: Your Honor, my objection is not to
7 what the job pays, but as to his W-2, what he made. I
8 think those are two different things.

9 THE COURT: That is true, isn't it? I mean, that
10 is two different things.

11 MR. WETTERMARK: Well, I mean, maybe we can
12 resolve it by, I will just have him refresh his
13 recollection with his W-2 and tell us what the annual
14 salary for that job was in 1999. I am not tied to having
15 his W-2 in evidence. I just want to prove what the job
16 makes.

17 MR. GARLAND: I think that is -- he can testify, I
18 guess, as to an hourly or daily rate, but what his W-2
19 has to do with it, I don't think that would refresh him,
20 because that would then give that evidence in another
21 form. So that is my objection.

22 THE COURT: I mean, you laid some foundation with
23 Mr. Kirkland's testimony about his eligibility, according
24 to his understanding of things, for that position.

25 MR. WETTERMARK: Right.

1 THE COURT: This is the fellow that holds that
2 position.

3 MR. WETTERMARK: Right.

4 THE COURT: I think Mr. Garland's point is a good
5 one on his W-2 as to how much he actually -- because
6 apparently you told me the other day there is a
7 complicated salary or compensation scheme used by the
8 railroad --

9 MR. WETTERMARK: It is, it's very complicated.

10 THE COURT: Which I don't know that you intend
11 to try to explain to this jury, or me for that matter,
12 but --

13 MR. WETTERMARK: It is too complicated to do it
14 that way in all honesty. I mean, they get paid a basic
15 day, plus they have arbitrary, plus they have over time--

16 THE COURT: There is a number of variables that
17 affect what a given employee is ultimately paid?

18 MR. WETTERMARK: Correct.

19 THE COURT: So what Mr. Walls is ultimately paid
20 may or may not be entirely the point that you are trying
21 to get at for the sake of -- I guess your economist
22 eventually is going to use some figure to --

23 MR. WETTERMARK: Sure. What Mr. Walls's
24 testimony is -- he can provide us testimony as to what
25 the pay for that job would be on an annual basis. And

1 because he is working he knows what that job pays. And I
2 don't know how else to establish the annual pay for the
3 alternative job.

4 THE COURT: All right. Do you object to what he
5 just described?

6 MR. GARLAND: But that's not doing that, he is
7 telling us his W-2, what his wages are, and I object to
8 that, because I think that would not be if somebody else
9 was working the job, just because all those same
10 variables he just described.

11 THE COURT: Well --

12 MR. GARLAND: There is a base on it, but he just
13 said you go into all this other stuff, over time and so
14 forth.

15 MR. WETTERMARK: The variables are the same for
16 whoever is working -- whoever is working that job gets
17 paid the exact same amount of money with one exception,
18 Mr. Kirkland would actually receive an additional payment
19 above and beyond what everybody else would.

20 THE COURT: Productivity thing?

21 MR. WETTERMARK: Right. But what I am going to
22 prove is, whoever works that job gets -- would get paid
23 what Mr. Walls gets paid. It does not matter if it is
24 Mr. Kirkland or Mr. Walls, or whoever else, that is what
25 that job pays.

1 THE COURT: Mr. Walls's W-2 for that particular
2 year is not necessary to be admitted to getting the
3 testimony you just described, is it?

4 MR. WETTERMARK: Sure. I mean, I -- that is what
5 I was saying earlier. I mean, I can get Mr. Walls to
6 testify what an annual salary for the job was in 1999
7 without putting his W-2 into evidence.

8 THE COURT: Or without using his W-2 figure
9 necessarily?

10 MR. WETTERMARK: Sure. I mean --

11 THE COURT: I don't want us being hypertechnical,
12 but I think Mr. Garland has a point there. And I --
13 okay, does that clarify the way we are going to handle
14 the way you are going to handle Mr. Walls --

15 MR. WETTERMARK: Sure.

16 THE COURT: Is there anything else this afternoon
17 that may come up?

18 MR. GARLAND: When do you anticipate finishing this
19 afternoon? I need to know that where I can have somebody
20 on --

21 MR. WETTERMARK: I am trying to think.

22 MR. GARLAND: Who else have you got?

23 MR. WETTERMARK: I have got a couple of agents.
24 I have got one other -- I have got the engineer, who
25 worked the other six months of the year besides Mr.

1 Williamson. I have 23 minutes on Epstein, 48 minutes on
2 Downey, so I have got --

3 MR. GARLAND: Is Downey --

4 MR. WETTERMARK: -- an hour and a half worth of
5 medical depositions and I have got some short witnesses.
6 I am doing

7 THE COURT: No, I think we are doing fine. Well,
8 you all can talk after I step out. But your sense is
9 that you will rest this afternoon, subject to the calling
10 of your other expert first thing in the morning?

11 MR. WETTERMARK: Correct.

12 THE COURT: It is reasonable to anticipate the
13 evidence will be concluded by lunch tomorrow?

14 MR. GARLAND: Probably, depending on -- I am not
15 sure how long he is going to be with this woman he is
16 running in on me tomorrow. I can finish it -- if I start
17 at 9:00 I can finish by 12:00 on my evidence tomorrow.

18 THE COURT: Particularly if we get some in today?

19 MR. GARLAND: That is right.

20 THE COURT: Some of your defense evidence today.
21 Okay. Anything else before we take a break?

22 MR. WETTERMARK: No, sir.

23 THE COURT: All right, we will be in recess until
24 1:15.

25 (LUNCH RECESS 12:15 p.m. To 1:15 p.m.)

1 THE COURT: Please be seated. I assume by that
2 signal from the bailiff we have another tape. You may
3 proceed.

4 (AT THIS TIME THE VIDEO DEPOSITION OF DR. JOHN MARTIN DOWNEY
5 WAS PLAYED FOR THE JURY).

6 MR. WETTERMARK: We will call James Edward King.

7 JAMES EDWARD KING

8 Witness having been first

9 duly sworn, testified on

10 DIRECT EXAMINATION

11 BY MR. WETTERMARK:

12 Q Would you tell us your name, please?

13 A James Edward King.

14 Q Where do you live, Mr. King?

15 A 102 The Bunkers in Aiken, South Carolina.

16 Q Are you nervous about being here in the courtroom?

17 A Yes, sir.

18 Q Who do you work for, Mr. King?

19 A Norfolk Southern Railroad.

20 Q How long have you worked for the railroad?

21 A It will be 34 years this October.

22 Q What is your position with the railroad?

23 A I am an operator/clerk now.

24 Q Where are you working now?

25 A Augusta, Georgia.

1 Q From 1990 up until about 1999 what was your position
2 at that time with the railroad?

3 A I was an agent for Aiken, South Carolina.

4 Q And what does an agent's job involve?

5 A Basically you work with the train crews, whether it
6 be the -- you know, the Aiken local or either through freights
7 that come through the valley and coordinate with the customers
8 on what they need as far as the car orders and inbound
9 shipments and make sure they give you the correct paperwork
10 for, say Hazmet materials and just basically you are a go
11 between between the trainmen and the customers.

12 Q If the trainmen, who were working the Aiken local
13 job, have a safety related problem concerning cars they are
14 picking up at an industry are you one of the persons they are
15 supposed to report that to?

16 A Yes, sir.

17 Q Could you tell us, sir, in that period between 1990
18 and 1999 did you receive any safety related complaints
19 concerning clay on the cars coming out of W. R. Grace?

20 A Yes, sir, numerous complaints.

21 Q You say numerous, tell us what you mean.

22 A Well, I don't -- one week you might get two -- they
23 go in there three days and all three days they see that they
24 have not blown the cars off, there is clay all over the ground
25 that needs cleaning up, you know, call them and tell them to

1 clean it up. And I would call and maybe talk to Mr. Woods out
2 there and tell him to clean it up, or something like that, and
3 then the next week maybe I would not get maybe for a couple of
4 weeks I would not get a complaint, and then it would go back
5 to being the same thing again. It varies at different times.

6 Q Within the range of that variance did you continue
7 to receive reports all the way -- from 1990 all the way up
8 until 1999?

9 A Yes, sir.

10 Q Did you speak with your superior officials at the
11 railroad about this situation?

12 A Yes. My immediate supervisor when I first went to
13 Aiken was Trainmaster John Mask. And he was there until, I am
14 guessing about '95, '96 and then Mr. Chapman came in as the
15 trainmaster then, Trainmaster Chapman. And I dealt closer
16 with Mr. Mask as far as reporting, because it was a district
17 set up then, we had not consolidated so much. But I did
18 report it to him, yes, sir.

19 Q How often? Can you give us an idea how often or how
20 many times you and Mr. Mask you reported this situation to Mr.
21 Mask?

22 A He knew it was on ongoing problems, I mean he was
23 trainmaster, he knew it was a problem. And I mean, I don't
24 know. I just don't know. I mean a bunch of times. It was
25 just like we still have a problem out at W. R. Grace or in a

1 normal conversation when we were talking about other parts of
2 working the railroad. But I can not give you no idea. I
3 mean, I don't know.

4 Q A lot?

5 A A lot, yes, sir.

6 Q As an agent there at Aiken, did you have the power
7 to go ahead and order that they don't handle cars anymore that
8 are unsafe out of W. R. Grace?

9 A No, sir. I am a contract employee. I am not a
10 company official. The only thing I can do to the crews, I
11 would tell them they would have to do certain things and if
12 they did not do it then I would report it on up, but I don't
13 have the authority to tell a customer we will not switch them,
14 no, sir.

15 Q Do you recall after Mr. Chapman got there, did you
16 ever have occasion to discuss the situation with him?

17 A I remember one occasion, but I don't remember the
18 conversation. It was something about we are having problems
19 with clay again, it is a standard problem. And I just did not
20 keep up with how many times I talked to him. I mean, I don't
21 know -- I know for sure of one, but I don't know if there were
22 several others, I just don't know. Because by that time they
23 had moved me down to Augusta.

24 Q Now, when they moved you down to Augusta would you
25 still have to come up to Aiken periodically?

1 A Yes, sir. I would come up there a lot of times with
2 supplies and stuff the men would need for printers and fax
3 machines and as an agent you do it all. You had to sweep and
4 mop the floors and that -- so I would come a couple of times a
5 week I would come back to the depot.

6 Q On the night of Friday, January 23rd, which was the
7 first night that Mr. Kirkland was injured, were you at Aiken
8 on that evening or that afternoon?

9 A Yes, sir. I came by Aiken that evening after the
10 Greenville dispatcher, I would say it is Greenville, I am
11 guessing now, somebody told me that Lester had got hurt. And
12 I said, well, I have to go by the depot anyway. I said, I
13 will see what is going on, because nobody really knew.

14 Q Did you go by the depot?

15 A Yes, sir, I did.

16 Q And did you see Mr. Kirkland there?

17 A Yes, sir, I did.

18 Q Tell us what you were able to observe about his
19 condition.

20 A I walked in. He was hunched over and he was real
21 nervous. He was tensed up. And then I looked at his left
22 hand -- Well, first off, when I walked in I saw him, I said,
23 Lester, what happened. And then I don't even remember what
24 he told me other than he said my feet came up from under me,
25 just boom, and I was on my back. And then I looked at his

1 hand and it looked to me like his thumb was either broke in
2 two places or either jammed in his wrist. I mean, I am no
3 doctor, but that is what it looked like.

4 Q You could see it was abnormal, it looked wrong?

5 A Oh, yeah. Yes, sir, it sure did.

6 Q So what did you do?

7 A I said, Lester, do you want me to take you to the
8 doctor. And he was talking on about what had happened to
9 him. He says, no, he says Assistant Division Superintendent
10 Burgess and Trainmaster Chapman and, I believe, he said the
11 superintendent from Columbia were coming down and going to
12 take him to the doctor. So, I said when. And he said -- I
13 said, how long -- Columbia is about 70 miles away and
14 Greenville, I guess, I don't know how far it is, 120, 130 and
15 that is where the assistant division superintendent is. And I
16 said, well, when are they going to be here. And he said,
17 well, we have been here an hour or so, I don't remember how
18 long it was, he said but I have to stay here and wait on them.

19 Q What about you said he was -- I think you said he
20 was hunched over with his back?

21 A Yes. He said that I asked him about his back, and
22 he said it felt like it was freezing up or just swelling or
23 something.

24 Q Was he able to sit down?

25 A No, sir.

1 Q What was he doing?

2 A He was pacing, he was walking in circles, more or
3 less.

4 MR. WETTERMARK: Mr. King, that is all I have,
5 thank you, sir.

6 THE COURT: Mr. Garland?

7 MR. GARLAND: Mr. King, let me just ask you a few
8 questions.

9 CROSS EXAMINATION

10 BY MR. GARLAND:

11 Q You said the one time you recall talking to Mr.
12 Chapman, was that the occasion in January of '98 about any
13 problems with Grace?

14 A No, it was before then. I am sure I talked to him
15 about it then also, but I was thinking of sometime earlier. I
16 can't -- what I can't get in my mind, fixed in my mind,
17 exactly when Mr. Marcum came down there on that job.

18 Q But you remember talking to him one time, that was
19 one time you talked to him in January of '98, isn't that
20 right?

21 A I don't remember

22 Q Do you remember talking to him in January of '98
23 about the Grace Company?

24 A Yes, I do. Yeah, I think -- yeah, okay.

25 Q Let me ask you this, another question. You had

1 mentioned something about cleaning up the ground at the Grace
2 and Company, are you talking about the ground at the plant out
3 there, the Grace and Company plant?

4 A Well, yes, sir. Where the crew said it was unsafe
5 for them to walk.

6 Q Do you remember, that was back in the -- was that
7 about the mid 90s before they paved out there?

8 A I never even knew they paved it out there.

9 Q Do you know Mr. Roberson?

10 A Pardon me?

11 Q Mr. Roberson, do you know him?

12 A Yes, I know him well.

13 Q Do you remember if he had anything to do with
14 getting the walkways paved out there or not? Do you know one
15 way or another?

16 A I know -- no, sir.

17 Q What was his official rank, Mr. Roberson, do you
18 remember?

19 A He was Terminal Superintendent of Columbia, South
20 Carolina.

21 Q You mentioned cleaning up the grounds, do you
22 remember anything else other than the walkways that you were
23 talking about about the W. R. Grace and Company grounds?

24 A Well, the cars were not getting blown off. I mean,
25 the ground and the cars were not getting blown off. They

1 would come around the curve and it would look like a car on a
2 dirt road, you know, a dry dirt road, instead of the dust
3 coming up it would be coming off the cars.

4 Q Whose job was it to blow off -- was it the
5 railroad's job or was it W. R. Grace and Company's job to blow
6 off those cars, do you know?

7 A W. R. -- we did not blow the cars off.

8 Q And you all did not go out and clean up the grounds
9 out there, I don't guess, did you, W. R. Grace?

10 A No, sir, we did not.

11 Q That was the W. R. Grace people?

12 A Yes, sir.

13 Q And you remember this talking to the man out there
14 who would you talk to at Grace and Company?

15 A It varied. David Wood, I believe, was the plant
16 manager. He was some type of manager. He ordered the
17 cars and furnished me the documents to ship them and all
18 that. And--

19 Q He was your contact, wasn't he, out there?

20 A Basically him and Sherry and then there was a couple
21 of others that I would talk to, but he was he was the main
22 man, yes, sir.

23 Q And is it correct when you would talk to him about
24 the problem there it would seem to get better for a while and
25 then -- is that right?

1 A Yes, sir, sometimes it would and sometimes it would
2 not.

3 Q How many times you reckon you talked to Mr. Wood?

4 A A bunch. I -- a lot.

5 MR. GARLAND: That is all I have.

6 REDIRECT EXAMINATION

7 BY MR. WETTERMARK:

8 Q Mr. King, you don't know anything about running a
9 kaolin loading facility, do you?

10 A No, sir.

11 Q And, I guess, the people at W. R. Grace, they don't
12 really know anything about what trainmen do on the trains
13 after they leave there?

14 A No, sir.

15 Q The responsibility for making sure that the trainmen
16 have safe coupler or safe grab irons and safe platforms to
17 stand on, that is the railroad's responsibility --

18 MR. GARLAND: I object to him leading his own
19 witness, Your Honor. Object to that.

20 THE COURT: Rephrase your question.

21 Q MR. WETTERMARK: Who is responsible between --
22 who is responsible for making sure that trainmen have safe
23 equipment to work on?

24 A Norfolk Southern Corporation.

25 Q Sure.

1 MR. WETTERMARK: That is all.

2 THE COURT: Is that all for this witness?

3 MR. WETTERMARK: Yes.

4 THE COURT: May he be excused?

5 MR. WETTERMARK: Yes, sir.

6 THE COURT: You may step down and be excused.

7 Mr. Wettermark?

8 MR. WETTERMARK: This is the video deposition of Dr.
9 Epstein.

10 (AT THIS TIME THE VIDEO DEPOSITION OF DR. FRANKLIN EPSTEIN WAS
11 PLAYED FOR THE JURY) .

12 MR. WETTERMARK: We will call Gary Walls.

13 GARY WALLS

14 Witness having been first
15 duly sworn, testified on

16 DIRECT EXAMINATION

17 BY MR. WETTERMARK:

18 Q What is your name, sir?

19 A Gary Walls.

20 Q Where do you live?

21 A In Columbia, South Carolina.

22 Q And who do you work for?

23 A Norfolk Southern Railway.

24 Q How long have you worked for the railroad?

25 A Since '79, 1979.

1 Q As an employee of Norfolk Southern do you hold a
2 union position with the railroad union?

3 A Yes. I am a local representative for the UTU,
4 Engineers and Conductors.

5 Q And when you say you are the local representative,
6 what does your job involve?

7 A I am more or less a mediator between the employees
8 and the management.

9 Q Are you aware of -- in your job as local chairman
10 are you aware of the various ways employees get to choose jobs
11 and what they get paid for various jobs?

12 A Yes.

13 Q Are you familiar with the Newberry switcher job?

14 A Yes, I am.

15 Q Do you know how much that job pays?

16 A Yes, sir.

17 Q How do you know?

18 A I am currently the conductor on that job.

19 Q Do you know what the Newberry switcher job paid the
20 conductor on that job during calendar year 1998?

21 A Yes, sir.

22 Q How much did it pay the conductor?

23 A \$77,000.

24 Q How about calendar year 1999, what did that job pay
25 for its conductor?

1 A \$73,069.

2 Q You will have to explain this a little bit, do some
3 employees on the railroad get an additional -- here is what I
4 am trying to ask you, if Mr. Kirkland was to work that job
5 would he get yet another payment on top of the numbers you
6 just gave us?

7 A Yes, sir. We have what they call a productivity
8 fund, and he Mr. Kirkland is one of the few that did not sell
9 his fund, so he would get an additional amount.

10 Q Some years down the road you all had an option for
11 taking cash money for it or taking the productivity fund paid
12 over time?

13 A Right.

14 Q How much would the productivity fund pay now per
15 day?

16 A It is averaging \$30.50 per day.

17 MR. WETTERMARK: Is my five minutes used up yet?

18 THE COURT: You may have another minute.

19 MR. WETTERMARK: I tell you what, I will give
20 that minute to Mr. Garland.

21 MR. GARLAND: Thank you.

22 MR. WETTERMARK: Let me ask you this.

23 Q MR. WETTERMARK: Does Mr. Kirkland have the
24 seniority to hold the Newberry switcher job?

25 A Yes, he does.

1 THE COURT: Mr. Garland?

2 CROSS EXAMINATION

3 BY MR. GARLAND:

4 Q Mr. Walls, when did this productivity pay that you
5 have just mentioned come into effect?

6 A It was approximately five years ago. I am not real
7 exact but approximately five years ago.

8 Q 1995, '96, somewhere like that?

9 A Yes, sir.

10 Q It has been in effect from then forward?

11 A Yes, sir.

12 Q Do you know whether at some point way back Mr.
13 Kirkland held the Newberry job?

14 A Yes, sir. Mr. Kirkland has worked the Newberry job
15 before.

16 Q And do you know whether or not he then decided to go
17 back into the Aiken job, or how did he get back? Do you have
18 any idea?

19 A Seniority out there, when jobs are changed or
20 conditions, we pull back and forth depending on who wants what
21 job. The oldest man gets choice.

22 Q Do you know whether or not he chose to go back to
23 Aiken, or do you know?

24 A I am not sure what the reasoning was behind that.

25 Q What would you suspect?

1 THE COURT: Hold on. If he doesn't know, he
2 doesn't know. I mean, I don't think his suspicion would
3 be proper.

4 Q MR. GARLAND: Seniority controls in those cases, is
5 that what you are saying?

6 A Yes.

7 Q So that productivity pay, whatever you call it, has
8 been in effect at least during the last five years; is that
9 correct?

10 A Yes, sir.

11 Q Do you think it might even have been back longer, or
12 do you really know a date on that?

13 A I would have to look back in my files to know the
14 exact date.

15 MR. GARLAND: That is all.

16 MR. WETTERMARK: I have one question.

17 REDIRECT EXAMINATION

18 BY MR. WETTERMARK:

19 Q You said, though, you had a choice between this
20 productivity fund, you could either take the productivity
21 fund, which pays you and extra \$30.50 a day now or you could
22 take a cash payment?

23 A Yes, sir.

24 Q You took the cash payment?

25 A Yes, sir.

1 Q Just out of curiosity, how much was the cash
2 payment?

3 A 70,000.

4 Q And Mr. Kirkland was one of the people who opted for
5 the \$30 a day in the future?

6 A Yes, sir.

7 Q Does that go -- if he were still working out there,
8 that \$30 a day, is that something that he would continue to
9 have gotten until the end of his career?

10 A It is looking that way, yes, sir, every day he
11 worked.

12 MR. WETTERMARK: Thank you, sir.

13 RECROSS EXAMINATION

14 BY MR. GARLAND:

15 Q And by the same token, Mr. Walls, every day he
16 worked after the productivity pay went into effect, that would
17 be true too, wouldn't it?

18 A Yes, sir, since this buy-out was in effect.

19 THE COURT: Does that conclude his testimony?

20 MR. WETTERMARK: Yes. Mr. Walls, I think you
21 just won the award for the shortest witness in history.

22 THE COURT: You may be excused, thank you. What
23 are you going to have next, Mr. Wettermark?

24 MR. WETTERMARK: We are going to read the last
25 medical deposition.

1 THE COURT: Okay. Why don't we take a break
2 before we do that?

3 MR. WETTERMARK: Sure.

4 THE COURT: Let's take our mid afternoon break.
5 When we come back we will have, I think, a medical
6 deposition to be read to you as opposed to the video, and
7 I will talk about that when we come back. Remember, no
8 talking about the case yet. We will be in recess for our
9 mid-afternoon break.

10 (COURT IN RECESS)

11 THE COURT: Mr. Wettermark, what do you have
12 next?

13 MR. WETTERMARK: I am going to call Dr. Childs.
14 We are going to read the deposition of Dr. Wendell
15 Duncan.

16 THE COURT: Ladies and Gentlemen, I explained to
17 you about the rules permitting depositions to be taken of
18 doctors and then presented to you during the trial and
19 you have seen some video tape depositions and it can also
20 be done by the taking of testimony that is then
21 transcribed, that is typed up and brought into Court to
22 be read to you, in which someone -- in this case Mr.
23 Childs will play the role of the witness and read the
24 answers, Mr. Wettermark will be reading the questions
25 that were actually posed to the doctor at the deposition.

1 Mr. Childs will be reading the answers. I guess Mr.
2 Garland when cross examination comes will get up and read
3 the questions that he asked of the doctor on cross. Just
4 as with the video tape testimony you should view this
5 testimony just as if the doctor were here testifying to
6 the words that you will hear Mr. Childs read as the
7 answers to the questions posed to the doctor on that
8 occasion. Go ahead, Mr. Wettermark.

9 MR. WETTERMARK: This deposition was taken at Dr.
10 Duncan's office on February the 28th, 2000.

11 DR. WENDELL DUNCAN

12 Witness having been first
13 duly sworn, testified on

14 DIRECT EXAMINATION

15 BY MR. WETTERMARK:

16 Q Could you tell us your name, please?

17 A James Wendell Duncan.

18 Q What is your profession?

19 A Orthopedic hand surgery.

20 Q Dr. Duncan, could you explain to us what the
21 practice of orthopedic surgery involves?

22 A Orthopedics is a practice that involves injuries and
23 abnormalities involving the musculoskeletal system, which
24 involves the skeleton, muscles, nerves, everything involved in
25 the extremities and the spine.

1 Q As I understand it, you have a subspecialty within
2 orthopedic surgery in the field of hands?

3 A Correct.

4 Q And the treatment of traumatic injuries to a hand,
5 is that something that falls within your field of expertise?

6 A Right.

7 Q Doctor, could you briefly tell us your medical
8 education and training that you have had to be an orthopedic
9 surgeon?

10 A Okay. My undergraduate education was at Mercer
11 University in Macon, Georgia; and I got my medical degree from
12 Medical College of Georgia; and then did my internship and
13 residency in the Greenville Hospital system in South Carolina;
14 and then did my hand surgery fellowship with the hand center
15 in Charleston.

16 Q Do you now practice here in Augusta, Georgia?

17 A Right. I have been with this group for almost 12
18 years.

19 Q Doctor, in your professional capacity have you had
20 occasion to see and evaluate Mr. Lester Kirkland?

21 A Yes, I did on July 16th, 1998.

22 Q Did you obtain a history from Mr. Kirkland?

23 A Yes, sir.

24 Q Could you tell us what that history was, please?

25 A The history I obtained found that he had worked for

1 Norfolk Southern Railway since 1974, and at the time was
2 living in Greenwood. And told me of an injury to his right
3 thumb, he stated was January 23rd of 1998 when he fell off a
4 railroad car that he was conducting. And in that fall not
5 only injured his thumb but said also his back and was being
6 treated elsewhere for that.

7 Q Did you obtain a past medical history with respect
8 to the thumb from Mr. Kirkland?

9 A Right. For this particular injury he had been
10 treated by an orthopedic surgeon in Aiken conservatively with
11 casting and then therapy, but stated that about 18 years
12 earlier in 1980 had injured a ligament to this thumb that
13 required surgical repair in Greenville, South Carolina

14 Q According to the history you took had he had a good
15 recovery from the injury 18 years ago?

16 A Yes. He said that he had been, you know, working
17 full time for the railroad and played golf and really denied
18 having any problems with the thumb.

19 Q Until the most recent injury?

20 A Right.

21 Q Now, I think you mentioned this, as far as the
22 injury that happened on January 23rd of '98, he had been
23 seeing other doctors before he came to you?

24 A Right.

25 Q And tell us, again, what treatment he had had before

1 he actually saw you --

2 A It was -- he said he was casted about five weeks and
3 then wore a removable splint for a period of time and had some
4 therapy as well for the thumb.

5 Q And what complaints or problems did Mr. Kirkland
6 have that he reported to you when he first saw you?

7 A He said it continued to hurt chronically, hurt with
8 most any use of the thumb, that it would continue to swell and
9 had stiffness.

10 Q Did you perform an examination on him?

11 A Yes.

12 Q Could you tell us the results of your exam?

13 A Well, I found that on that joint he lacked about 55
14 degrees getting the joint up completely straight. What we
15 call extension. So he was -- it would sit in a flexed posture
16 and then when he went to flex it further he could only go
17 another 10 degrees or only had about 10 degrees of active
18 movement of that one joint of his thumb.

19 Q If I could stop you at that point, what is the
20 medical term to describe the joint in his thumb that was
21 injured?

22 A It is the metacarpageal joint.

23 Q And because the jury can't see what you are doing,
24 am I correct that that's the joint where the thumb basically
25 is attached to the hand?

1 A Correct.

2 Q And what range of motion does that joint normally
3 have? What range of active motion would the joint normally
4 have?

5 A It will be normal for most people to have at least
6 60 to 70 degrees.

7 Q And Mr. Kirkland only had 10 degrees?

8 A Ten degrees of active motion. He could flex to 65,
9 but it started at 55 degrees because he would sit at a
10 posture of 55 degrees and could not get it any straighter than
11 that.

12 Q You will have to try to explain it a little bit to
13 us, if you can, using words.

14 A Okay.

15 Q When he came to you, what was the position that his
16 thumb was in when you saw him?

17 A That joint, just resting, was flexed about 55
18 degrees and he could not straighten it up any further than
19 that.

20 Q And when you say it was flexed, you mean that --

21 A Bent down.

22 Q -- the thumb was bent toward the palm of the hand?

23 A Correct.

24 Q And he was unable to straighten it out to a straight
25 position?

1 A Right.

2 Q Did you test the joint for laxity of motion?

3 A Yes. There are ligaments on the side of the joint
4 that keep it from opening up side to side and on one side of
5 the thumb it was loose. And just manipulating it with my
6 fingers it would easily open up about 30 degrees, which is
7 excessive.

8 Q What is the significance of that, the lack of
9 motion?

10 A It is a sign that the ligament is not as tight as it
11 is supposed to be, so there is abnormal looseness of the
12 joint.

13 Q Did you perform x-rays on the hand?

14 A Yes, I did.

15 Q And could you tell us what those revealed?

16 A It showed that there was some spurring from some
17 degenerative changes, which is just a word for, you know, it
18 is wear and tear and some -- what I refer to as roughness of
19 the head of that bone from wear and tear.

20 Q Doctor, based upon your exam and history and, of
21 course, the radiographic findings what was your impression at
22 this time?

23 A That with all of the problems with the joint, being
24 the abnormal wear that had developed, the looseness of the
25 joint, that it would -- the best treatment would be a fusion

1 of that joint rather than any other type of attempt at soft
2 tissue reconstruction.

3 Q If you would, tell us, when you say a fusion of the
4 joint, what does that mean?

5 A Well, a fusion is just a term for where we take out
6 a diseased joint, putting raw bone surfaces together in a good
7 position to allow the bones to heal together. So it is like
8 when a broken bone is put back together and it heals solid as
9 one bone.

10 Q After a joint is fused does it have any motion?

11 A Not at that one joint, it doesn't.

12 Q So basically when you say fuse the joint it takes
13 away all the motion from that one joint?

14 A Correct.

15 Q You mentioned that you did not recommend or did not
16 think that it was advisable to try soft tissue reconstruction
17 of the thumb, why?

18 A Primarily because of the wear that he already has of
19 the joint. I would be very concerned that soft tissue
20 reconstruction would just give him a tighter, but still
21 painful, joint.

22 Q Now, you did not do this fusion surgery on Mr.
23 Kirkland; is that correct?

24 A No.

25 Q If he decided to undergo this surgery what sort of

1 functionality will he be left with after he has the surgery?

2 A Most people get back to doing about anything they
3 ever did before, because not only is it now a painless joint,
4 but a very strong joint because the bone is fused together.
5 There is no looseness or abnormal movement. And if the other
6 joints adjacent to this are working well, like his are, it is
7 usually a very strong, painless, functional joint.

8 Q I was going to ask you, the fusing of the joint,
9 what is the primary reason to fuse the joint? What are you
10 looking to do by fusing it?

11 A Primarily to stop the pain.

12 Q And then on this particular joint of the thumb, as I
13 understand it, even after you fuse it and he loses all the
14 movement in that joint he still can maintain a fairly good
15 functionality with his hand?

16 A Right.

17 Q When this joint is fused do you have to pick an
18 angle for it to be permanently fixed in?

19 A Yes. We just found traditionally through experience
20 that a position of 5 or 10 degrees of flexion is the most
21 functional.

22 Q And just so we can understand what that is, if you
23 open your hand up, I guess, and bend all your fingers and your
24 thumb fully backwards, is that considered full extension?

25 A Correct.

1 Q And so you are saying that you take from that full
2 extension and you go forward just 10 degrees and that is where
3 you try to leave the thumb?

4 A Right.

5 Q Even after this fusion is done, will he end up with
6 a permanent medical impairment secondary to the fusion?

7 A Yes.

8 Q How much permanent medical impairment will he have?

9 A According to the AMA guides to the evaluation of
10 permanent impairment it says it is 6 percent impairment of the
11 thumb.

12 Q I did not ask you this the formal way, Doctor, but
13 let me ask you this, when you say he would be left with a 6
14 percent impairment, is that an opinion that you would hold to
15 a reasonable degree of medical probability?

16 A Yes.

17 Q Doctor, do you have an opinion, again, to a
18 reasonable degree of medical probability as to whether or not
19 this fall that he described to you as having occurred on
20 January 23rd, '98, do you have an opinion as to whether or not
21 that caused or contributed to the problems he was having with
22 his thumb that led to your recommendation for a fusion?

23 A Yes. Just going by his history he did not develop
24 these specific problems with the thumb until after this
25 injury.

1 Q The impairment that you said he would have, if he
2 undergoes this fusion, is that a permanent impairment?

3 A Yes.

4 Q Now as I understand it, at the time you saw him for
5 his thumb he was also being treated separately for a back
6 problem?

7 A That is right.

8 Q And you did not undertake to deal with his back
9 problem at all?

10 A No, I did not address that.

11 MR. WETTERMARK: Thank you, Doctor.

12 CROSS EXAMINATION

13 BY MR. GARLAND:

14 Q Doctor, let me ask you a few questions now. You
15 made a report in your records of this visit, did you not?

16 A Yes.

17 Q I would like to ask you to refer to that while I ask
18 you a few other questions. Did you explain to Mr. Kirkland
19 that a fused MP joint would be very, very functional?

20 A Yes, I did.

21 Q In fact, those are the words, were those words that
22 you used in your report?

23 A That is right.

24 Q All right. Did you explain that this was in your
25 opinion his best option?

1 A Yes, I did.

2 Q And, in fact, did you see any reason not to go ahead
3 and have the fusion of that joint?

4 A No, I did not.

5 Q And did you think that you could get him back to
6 work with a fused thumb joint?

7 A Oh, definitely.

8 Q And in your specialty, as a hand surgeon, I guess
9 you treat lots of thumb cases, don't you?

10 A Right.

11 Q And the fusion we are talking about, a MP joint
12 fusion of the thumb, is that a fairly routine and common
13 operation that you perform?

14 A Yes, it is fairly common.

15 Q All right. And in most cases do the people who are
16 in their early 40s return to work and to activities after such
17 an operation?

18 A Yes, they do.

19 Q If someone was a golfer, would you still be able to
20 hold and swing a golf club with a fused thumb?

21 A Yes.

22 Q In fact, can you -- in most occupations with the use
23 of your hand, could you still perform most occupations after a
24 fused thumb joint?

25 A Yes, you can. In fact, I am not sure if I can come

1 up with any occupation that would be a problem except,
2 perhaps, a professional baseball pitcher.

3 Q I see, can you still shake hands?

4 A Oh, yeah.

5 Q Doctor, you mentioned 6 percent, is that a
6 disability of just the thumb joint?

7 A That is considered an impairment of the whole thumb
8 itself, which they would calculate out to 2 percent impairment
9 of the whole hand.

10 Q And that would be the whole body, how does that
11 translate into impairment, a 6 percent of the thumb?

12 A It would be 1 percent.

13 Q Your don't got for 1 percent whole body ratings, do
14 you?

15 A Right.

16 Q In your opinion, could he have returned, after
17 pursuing a normal period of recovery, to the job of being a
18 conductor on a railroad?

19 A Oh, yes. It would probably be at least 8 to 10
20 weeks.

21 Q 8 to 10 weeks of recovery?

22 A Yes.

23 Q Okay. Have you seen Mr. Kirkland since the
24 evaluation of July 1998?

25 A No, sir.

1 MR. GARLAND: Thank you, Doctor.

2 REDIRECT EXAMINATION

3 BY MR. WETTERMARK:

4 Q I gather if he undergoes the surgery then
5 fortunately the thumb injury will not be disabling to him as
6 far as his railroad job; is that right?

7 A I am sorry, rephrase that.

8 Q It was probably a bad question. Let me withdraw it.
9 When you say that he can get back to work on the railroad
10 you are talking about with respect to his thumb?

11 A Right.

12 Q You are not drawing any opinions about what may have
13 happened with his back?

14 A Oh, no, not at all.

15 MR. WETTERMARK: Thank you, Doctor.

16 THE COURT: Is that it?

17 MR. WETTERMARK: Yes, sir.

18 DR. FRED JOHNSON

19 Witness having been first
20 duly sworn, testified on

21 DIRECT EXAMINATION

22 BY MR. WETTERMARK:

23 Q Could you tell us your name, please?

24 A Fred Johnson.

25 Q What is your profession?

1 A Retired profession of economics, University of
2 Alabama at Birmingham.

3 Q Where do you live, Dr. Johnson?

4 A Birmingham, Alabama.

5 Q I say, Dr. Johnson, do you have a doctorate degree?

6 A I have a Ph.D. in economics.

7 Q Could you tell us the education and training that
8 you have had to be an economist?

9 A Yes. I have a BS and MS degrees in statistics, a
10 Ph.D. in economics.

11 Q Where are your degrees in statistics from?

12 A Alabama.

13 Q University of Alabama?

14 A Yes, sir.

15 Q In both undergraduate and your Master's?

16 A Yes, sir.

17 Q And where do you have your doctorate degree in
18 economics?

19 A University of Alabama.

20 Q You told us that you used to teach at the University
21 of Alabama in Birmingham?

22 A Yes, sir.

23 Q How many years?

24 A I taught there for 20 years and retired in 1989.

25 Q Dr. Johnson, does one area or one part of the field

1 of economics deal with making calculations to determine the
2 present value of an injured worker's future lost wages?

3 A Yes, sir.

4 Q Is that something that you have experience doing?

5 A Yes, sir.

6 Q Tell us what your experiences in doing these sort of
7 calculations are.

8 A I think I started around 1970, so it would be a
9 period of almost 31 years. I have probably been in 20, 22
10 states in the country, in Federal and State courts in most of
11 those states.

12 Q You have made these sort of calculations hundreds of
13 times?

14 A Yes, sir.

15 Q Can you tell us -- what we are trying to find, why I
16 hired you, is we want you to determine how much money would
17 have to be awarded today to compensate someone for his lost
18 wages and fringe benefits in the future. Can you start us off
19 and tell us what are the criteria, what sort of information do
20 you have to have to start this process?

21 A You need to know the person's date of birth for the
22 purpose of establishing something we call work life
23 expectancy.

24 Q In Mr. Kirkland's case have I provided that to you?

25 A Yes, sir. His date of birth is 5/19/55. His work

1 life expectancy is 15.94 years. Incidentally, his life
2 expectancy is 30.6 years.

3 Q And how do you make those determinations?

4 A The U.S. Department of Labor is the source for the
5 work life. The U.S. Department of Health and Human Services
6 is the source for the life expectancy.

7 Q Okay. Now, let me talk to you a little bit about
8 his work life expectancy. Why do you need to have that?

9 A So you can project income over the remaining number
10 of years that he would have expected to be employed. And,
11 incidentally, I use the word employed intentionally because
12 work life expectancy is not the number of years until you --
13 he would retire, but the number of years that he would remain
14 in the work force. So, for example, his age is currently just
15 under 46, if you add 46 and 15 that will take you to 61, that
16 does not mean that he would retire at 61. It means that if he
17 retired at 65 there would be a four-year period that he would
18 be out of the work force. It could be illness, layoffs,
19 injury --

20 Q So things like that, the fact that he could get laid
21 off or get sick, those are built into your work life
22 expectancy calculation?

23 A Yes, sir.

24 Q Now, we know what, statistically, his work life
25 expectancy is, what is the next step you need to take?

1 A Because the measure of damages is the contrast
2 between the pre-injury capacity to earn and the post-injury
3 capacity you have to know both. The best evidence of what he
4 could earn prior to his injury would be his tax returns, or if
5 he has not worked in a while, and I do not think Mr. Kirkland
6 has worked since '98 on the railroad job, early '98 in fact,
7 that is a period of a little over three years, you can use
8 something that we call comparable worker pay to establish what
9 he would be earning today. So that -- one of the two of
10 those, or both, could be used to establish his pre-injury
11 capacity and then I will have to rely upon someone else's
12 opinion as to his post-injury capacity. For example, if
13 someone says that maybe he can make \$8 an hour then I will
14 have to go with that. I am not an expert in the area of what
15 he can earn now.

16 Q Well, let's talk about his earning capacity before
17 his injury. You said that we can look at his actual earning
18 experience?

19 A Yes, sir.

20 Q Or we can go -- when he has been out of work for
21 several years like this we can go and look and see what the
22 job he would be working now would be paying?

23 A Exactly.

24 Q All right. Well, let's do both of those.

25 A All right.

1 Q With respect to his earnings, what information did
2 you have to have to determine that?

3 A Remember that he was injured January 26th, '98, so
4 his last full year of work was '97. I averaged his '96 and
5 '97 earnings and came up with \$55,116.

6 Q Now, once we have his earnings, the average earnings
7 of \$55,000, is it simply a matter of taking that and
8 multiplying it by his work life expectancy?

9 A No, sir.

10 Q Why not and what do we have to do?

11 A Certain things have to be removed. For example, he
12 should not collect on the taxes he would have to pay out of
13 this income, so I am taking Federal and State taxes out;
14 neither should he be expected to collect on the expenses that
15 would be related to his employment, employer related expenses
16 are taken out, those total 30.1 percent. So I am taking out
17 from the \$58,115 or \$16 an amount equal to 30.7, I believe I
18 said 30.1, it is 30.7, leaving a net income of \$38,195.

19 Q So that number, \$38,000, that is what he would have
20 taken home after he paid his taxes and after he paid all his
21 employer related expenses?

22 A Yes, sir.

23 Q So this number you are going to calculate is just
24 going to replace his after tax income?

25 A That is correct.

1 Q Why is that?

2 A Because it is defined as contribution, how much the
3 family would benefit from him working after he has paid his
4 taxes and his expenses.

5 Q All right.

6 A Now, next -- we have talked about two of the
7 variables, how long he is going to work, how much he could be
8 making net. Now we have to ask what would that income do in
9 the future. We can anticipate that a worker is going to get a
10 pay raise.

11 Q Sure.

12 A Rather than speculate about whether it will be 6
13 percent a year or 4 percent a year, we use what we call real
14 values. Where a real value is defined as inflation adjusted.
15 So, for example, if I get a 5 percent raise and inflation is 4
16 percent, 5 minus 4, 1 percent real wage gain.

17 Q In other words, you really have not gotten a 5
18 percent wage increase?

19 A The hardest thing to project in our economy is
20 inflation. So, therefore, you can get a more precise
21 determination of future values if you just take inflation out,
22 which is what I have done. I am using a 1.22 percent average
23 annual real wage gain for this gentleman over his remaining
24 work life.

25 Q And an average annual real wage gain, that means

1 that his pay raises will exceed inflation by that much?

2 A Barely. 1.22 percent.

3 Q Okay.

4 A Lastly, because you are providing this future income
5 stream today, instead of him having to wait 10 years to get
6 this 10th year pay you are giving it to him today, you have to
7 discount that future value to its present value, so we have to
8 use a discount rate. It is the same thing as saying what can
9 I earn if I take my money down to the bank or if I buy a CD,
10 or something like that. You remember that I took inflammation
11 out of his wage increases, I am going to take inflation out of
12 his discount rate, so we have apples and apples when we
13 compare them. I am using the three-year U.S. Government bond
14 to approximate the average yield on a market basket of
15 instruments that can go anywhere from cash, which pays
16 nothing, to government bonds to CDs, if you really want to be
17 foolish you put some in the stock market. And I have been
18 recently.

19 Q You and a lot of other people.

20 A Yes, sir. And a lot of other people, like me, got
21 hurt. But, anyway, I would not ask that someone untrained,
22 even someone trained, theoretically, would mess with the stock
23 market if you have to live on that income, okay?

24 Q It is a determinant risk, right?

25 A Certainly. You know there are risks, trade-offs,

1 and yield trade-offs and liquidity trade-offs. When you
2 compare all of those, analyze all of those, then the
3 three-year government bond probably best approximates the
4 yield that you could get on his market basket. Now, I take
5 inflation out of that. Because this award must be invested,
6 if you have already taken income taxes out, so you don't want
7 to cheat him by taxing him twice, you take taxes, out of that
8 interest earned to give him credit for that and what we are
9 left with is called a tax adjusted real discount rate. It is
10 the yield you get, less inflation, less the taxes you pay on
11 it.

12 Q Can you give us an example; plug in some numbers
13 maybe and give us an example?

14 A Yeah, I think I can. You know, I am so used to this
15 that it is hard to do it in your head anymore. Let's suppose
16 that I can get a yield of 6 percent and suppose I pay 20
17 percent taxes, that leaves 4.8, correct? And suppose
18 inflation is 4, that leaves .8. So here I go, 6 percent by
19 subtracting inflation and taxes from it is leaving a tax
20 adjusted real yield of .8 percent. As a matter of fact, given
21 this gentleman's tax bracket the yield rate that I used for
22 him is .69 percent.

23 Q Okay. Let me just -- let me try it this way. Let
24 me just pick a good round number and get you to explain how
25 that works. Let's just say you invested \$100,000 at 6

1 percent, like you said, you get \$6,000 back from that
2 investment in the course of one year; is that right?

3 A Yes, sir.

4 Q But then you would have to pay taxes on that 6,000?

5 A Yes, sir, \$1,200 worth.

6 Q And then inflation would eat away at some more of
7 it?

8 A 4 percent, using my example.

9 Q And so really you are not getting as much as --

10 A You have made \$800 in real terms, that is what we
11 mean by the tax adjusted real interest rate.

12 Q And so that is why you use it this way?

13 A Yes, sir.

14 Q To take all those factors into account?

15 A Yes, sir.

16 Q Okay. Anything else that you need in your
17 calculation?

18 A I think I have covered all of them with the
19 exception, I think I covered it too but not explicitly, what
20 he can earn now.

21 Q And we will talk about that in just a second.

22 A Okay.

23 Q But I guess the first calculation I want from you,
24 and let me go ahead and tell you what -- I will make sure that
25 my understanding of what you have done is the same as yours.

1 Have you made a calculation to determine the sum of money that
2 would have to be awarded now and invested by Mr. Kirkland to
3 replace his future railroad lost earnings based upon what he
4 was making before the injury?

5 A Yes, sir.

6 Q But made that calculation so that at the end of his
7 work life expectancy everything would be gone, all the
8 principal, all the interest would be used up replacing his
9 future income. Have you made that calculation?

10 A Yes, sir.

11 Q And could you tell us, how much would have to be
12 awarded today to replace his future railroad income?

13 A 633,324.

14 Q Tell me again.

15 A 633,324.

16 Q And at the end of his work life expectancy, however
17 many years it is, all this money would be gone?

18 A Assuming he can not work.

19 Q Correct. Can not do anything?

20 A That's right.

21 Q I got you. And this number is based upon what he
22 was making three, four years ago on the railroad?

23 A '96 and '97, which was quite a long time ago.

24 Q Have you also done this calculation based upon the
25 earnings of a job that he could be working now?

1 A I used a 75 percent impairment rating, now whether
2 that has changed since we talked I don't know.

3 Q I am going to ask you about that in a second. I
4 guess I am kind of flip-flopping on you, Dr. Johnson. You
5 have not been here, but we have heard testimony in here from
6 Mr. Gary Walls about what the job of the Newberry switcher
7 pays.

8 A Uh-huh (affirmative).

9 Q Have I provided you with the information concerning
10 what that job pays?

11 A No, sir, you have not, but I can do it in a brief
12 moment if you will tell me.

13 Q Actually I have somewhere, Dr. Johnson.

14 A Well, I am using a 75 percent impairment rating.
15 Now, whether that is reflective of that job, I don't know.

16 Q Okay. We will come back to that. Let's go back and
17 let's work again on his -- based on his 1996, 1997 earnings,
18 okay? You said the second thing that you could do is assume
19 his post-injury earnings?

20 A Yes, sir.

21 Q Now, I am going to have to ask you to assume
22 something based upon what a witness who is going to testify
23 tomorrow morning is going to testify to and get you to make a
24 brief calculation. I didn't mean to fuss at you.

25 A Yes, you did. What is the evidence going to show?

1 Q I will ask you to assume that he has been evaluated
2 by Dr. Kessler, a Vocational Rehabilitation Specialist, and
3 that Dr. Kessler has calculated that Mr. Kirkland in his job
4 will be able to obtain in his injured condition now, which is
5 based upon -- is that he will lose 79 percent of his access to
6 his former wages has been loss, that you will lose
7 approximately 79 percent.

8 A Okay.

9 Q I will take that back, Dr. Johnson. Let me just
10 double check these numbers. I want to make sure -- you can
11 fuss at me now. He has lost access to 79 percent of the type
12 of jobs he used to be able to work --

13 A Uh-huh (affirmative).

14 Q -- but he has lost access to 75 percent of his
15 former wages.

16 A Well, that is exactly what I said earlier, 75
17 percent, do you remember that?

18 Q I can not remember, Dr. Johnson, but I -- really, I
19 apologize.

20 A Now, that is all right. Now, let's assume that
21 instead of losing all of that 633,000 he is only going to lose
22 25 percent of it, I mean 75 percent of it, which means that he
23 can make 25 percent, so now the present value of the
24 difference between the net earnings would be 474,993.

25 Q Okay. Tell me that again.

1 A 474,993.

2 Q 474 --

3 A 993.

4 Q Now, this 474,993, am I correct that this is the
5 number that is assuming he goes to work tomorrow at a job that
6 pays roughly 25 percent of what he was making on the railroad
7 and works it until the end of his career --

8 A With the same kind of pay raise that I gave him in
9 the railroad job.

10 Q So he would start a job paying 25 percent and then
11 would get raises from that?

12 A That is correct.

13 Q That it would take 474,993 invested to make up the
14 difference?

15 A Yes, sir.

16 Q To get him back to where he would have been?

17 A That is correct.

18 Q Dr. Johnson, I will also ask you to assume that Mr.
19 Kirkland's health insurance expires at the end of this year.
20 Have you made a calculation to determine the sum of money that
21 would be necessary to provide him with the money to pay the
22 premiums for health insurance for the rest of his work life?

23 A I made a calculation based upon it having already
24 expired. If it expires at the end of this year that would be
25 rounded off .75 years from now. So what I am going to do is

1 revise the calculation based upon a work life of 15.94, less
2 .75, correct? 121,763 $\times 474993 = \underline{\underline{\$556,756}}$

3 Q 121,763?

4 A Yes, sir.

5 Q That is the amount of money that he would have to
6 invest and then use the return to pay the premiums?

7 A Over his work life, that is correct.

8 Q Okay. Now, the other thing I wanted to ask you
9 about is, in his case, we have determined that there is a job,
10 the Newberry switcher, that he was now -- he would stand to
11 work at the present time. And is it possible to do this same
12 sort of calculation to determine what his future losses are
13 based upon the income he would have earned in that job?

14 MR. GARLAND: I am going to object to calculations
15 made on a speculative question like that as to what he
16 may have done, could have done, might have done and that
17 sort of thing. I just think that is -- that is just
18 improper to speculate like that. I think the way he has
19 already characterized this is the normal and customary
20 formula. But then to go and say what he might have done,
21 might have taken another job somewhere else is just
22 improper.

23 MR. WETTERMARK: Well, I mean, there is no might
24 about it. The job is there, he has the seniority for it,
25 he is entitled to work it. He would be working it if he

1 had not have gotten hurt.

2 THE COURT: I overrule the objection.

3 Q MR. WETTERMARK: Do you have those calculations?

4 A Yes, sir.

5 Q Tell us, is the process that you go through to make
6 those calculations the same.

7 A Yes, sir. The only thing that would change is the
8 base-year difference in the two incomes. Obviously, if this
9 job would be paying more then the present value is going to be
10 greater just based upon that single fact.

11 Q Did I provide you with the amounts that that
12 Newberry switcher job paid in 1998 --

13 A Yes, sir, it would be --

14 Q -- '99?

15 A Yes, sir, it would be \$80,334, gross.

16 Q Did you get that by combining the two?

17 A I combined the 72,482, which was the average --
18 there is a \$30.20 per day amount bonus, or whatever you call
19 it

20 Q Productivity fund.

21 A Productivity added to that, that is how it got from
22 72,5 up to 80.

23 Q Okay. Great. Can you tell us, sir, based upon the
24 earnings of that job what the present value of his future loss
25 railroad earnings are?

1 A The equivalent number to the -- to the 633 that I
2 gave you earlier, that would be the, quote, railroad
3 earnings--

4 Q Correct.

5 A -- would be 938,823.

6 Q Okay.

7 A The equivalent number to the difference, you
8 remember I said that if he works this job then the present
9 value of the difference would be 474,993?

10 Q Correct.

11 A The equivalent number to that, given the higher
12 income level, would be 775,476.

13 Q I have got it. And the insurance would stay the
14 same?

15 A Insurance would stay the same.

16 Q All these numbers you have been giving us, are those
17 projections from today forward?

18 A Yes, sir.

19 Q Have you calculated how much he has lost in past
20 lost wages from the date of his accident up until the present
21 time?

22 A Yes, sir, I have.

23 Q Can you tell us how much is that?

24 A The first scenario, assuming he would be making 55
25 plus, he has already lost \$111,924. The second scenario based

1 upon the \$80,000 per year current pay --

2 Q Yes, sir.

3 A -- he has already lost 157,915.

4 Q These numbers you have given us, these are after tax
5 numbers?

6 A Yes, sir.

7 Q So you have already taken out the income tax?

8 A And expenses.

9 Q And, again, with respect to these future numbers,
10 they have been calculated so that if they are invested, if he
11 uses the money to replace his lost income at the end of his
12 work life expectancy when he is 61 years old, all this money
13 will be gone?

14 A Yes, sir.

15 MR. WETTERMARK: Thank you, Dr. Johnson.

16 THE WITNESS: Thank you, sir.

17 THE COURT: Mr. Garland?

18 MR. GARLAND: May it please the Court?

19 THE COURT: Yes, sir.

20 CROSS EXAMINATION

21 BY MR. GARLAND:

22 Q Dr. Johnson, we have not met. I am Ben Garland and
23 I have some questions I would like to ask you now.

24 A How do you do, sir.

25 Q I take it from your exchange with Mr. Wettermark

1 that you have known Mr. Wettermark for some time?

2 A Since he was a brand new lawyer.

3 Q And is it true that Burge and Wettermark, their
4 firm there, is the largest, by volume, of any client that you
5 have?

6 A Any single client?

7 Q Yes, sir.

8 A That is correct.

9 Q What percentage of -- first of all, how many of
10 these cases, either in depositions or in court testimony, do
11 you do a year, on average?

12 A Between 25 and 40 probably, that is based upon -- I
13 just put together my 2000 experience, and that is what --
14 somewhere between 25 and 40 last year.

15 Q Do you recall testifying for a defendant in a
16 personal injury case like this?

17 A I am sorry, sir. Do I recall testifying for a
18 defendant?

19 Q Yes.

20 A A deposition, yes, but not in live testimony.

21 Q Now, of these cases --

22 A And, by the way, that would be -- I guess you are
23 talking about railroad cases? I also do commercial cases
24 where somebody has lost profits, or something like that.
25 About half of my work in there is for the defendant.

1 Q Now, of your FELA cases, what percentage of those
2 would be for the firm of Burge and Wettermark?

3 A I have never calculated that, sir. I do work for --
4 by FELA you mean railroad cases --

5 Q Railroad cases.

6 A -- of course, and I do work for about six or seven
7 firms that specialize in railroad cases, so I have never
8 broken it down.

9 Q Would it be as much as half, you think?

10 A It is possible but not likely.

11 Q More like 40 percent, would that be -- does that
12 sound --

13 A Anything I tell you would be just a wild guess, but
14 40 percent sounds reasonable.

15 Q Dr. Johnson, you are an attorney as well as a Ph.D.?

16 A I have a degree in law. I have a license to
17 practice law, but I have never found any reason to do so.

18 Q What is your fee as an expert?

19 A \$150 an hour for consultation.

20 Q What about testimony?

21 A Testimony is obviously -- if I come to Macon and it
22 takes me 12 hours, let's say, before I get back home I don't
23 charge but 8. I have a fee that cuts off after 8 hours. I
24 don't believe anybody is worth more than 8 hours work.

25 Q Do you fly over or do you drive over?

1 A Today I flew to Jacksonville and drove up.

2 Q Is that Mr. Wettermark's plane or is it commercial?

3 A No, it is commercial. And the auto was too.

4 Q You have never spoken, I don't guess, with Mr.
5 Kirkland, have you?

6 A I don't remember having done so, no.

7 Q Am I correct that the documents that you reviewed
8 were the documents given to you by Mr. Wettermark?

9 A Yes, sir.

10 Q Now, the tables, the work life expectancy tables
11 that you calculated, is that for the public as a whole or is
12 that for railroad specific?

13 A It is for private sector workers in the United
14 States overall.

15 Q overall?

16 A Yes, sir.

17 Q All right. Do you know, is there a difference in
18 the work expectancy life for railroad workers as opposed to
19 industry overall?

20 A I don't know, because in my opinion there is no such
21 thing as a realistic, reliable railroad work life table.
22 There are things that purport to be, but if you ask them how
23 they put it together they will not tell you.

24 Q You have never tried to put one together, have you?

25 A No, sir, I would not be capable.

1 Q This is, of course, not the first railroad case you
2 have testified in. Have you testified in any cases involving
3 clerks, wages lost by clerks?

4 A Sir, I am sure I have.

5 Q Do you recall wage rates of the office clerks in the
6 cases that you have testified in --

7 A No, sir.

8 Q -- do you recall that?

9 A No, sir.

10 Q If I told you that wage was probably \$40,000 a year,
11 does that sound in line or --

12 A I would not have an opinion one way or the other.

13 Q Were you aware that the railroad has made offers of
14 clerk positions to Mr. Kirkland?

15 A That is something that I do not get into. I respond
16 to the hypotheticals of the attorney.

17 Q And the hypotheticals given assumes no railroad job,
18 isn't that what it assumes?

19 A I think it assumes some kind of job that would pay
20 about 25 percent of his former wages, but what that job is I
21 don't know.

22 Q What would that figure be, 25 percent of his normal
23 wages? Can you calculate that for us?

24 A Well, it was 55,116, it would be about 13,779
25 divided by 2080 would be about \$6.62 an hour.

1 Q That is the information you have that you have based
2 everything on that, correct?

3 A That is correct.

4 Q Now, in this second calculation you did were you
5 using somebody's W-2 form to come up with that number you gave
6 us, that number on the second calculation? How did you arrive
7 at that?

8 A That information was provided by attorney.

9 Q And what was the nature of that?

10 A The nature of it was how much a Mr. Walls made in
11 '98 and '99.

12 Q What are you looking at, his W-2 form?

13 A No, sir, just what I was told.

14 Q Did you understand where that came from or do you
15 know? Is that just what he said or did it come from some
16 document?

17 A I would assume it came from some document, railroad
18 earnings document.

19 Q Now, under the calculation you just gave, too, you
20 said that the future of the past loss, you recall, under the
21 first scenario you gave us, was something like an average of
22 \$55,000 a year, is that what you said?

23 A It was after taxes about 39 a year.

24 Q And that was based on averaging two years of
25 earnings; is that correct?

1 A That's correct.

2 Q Did you have access to the four or five year earning
3 history?

4 A You know, I don't recall, but if I did I did not use
5 it.

6 Q Any reason not to use it or just --

7 A Well, typically since the charges to compare
8 pre-injury capacity with post-injury capacity it is typical
9 that the last year is because people get wage increases, would
10 be the better years, and that would establish his capacity.
11 In this case I am not positive, but that would be what is
12 typical.

13 Q Now, the past loss wage you gave us in the second
14 calculation using Mr. Walls's figures --

15 A That is correct.

16 Q -- what date did you assume he would leave his job
17 and take over Mr. Walls's job to get that past earning
18 calculation that you gave us?

19 A I established a loss for '98, for '99 and for 2000.

20 Q So does that assume that instead of does that
21 assume, then, the loss began January the 23rd of 1998; is that
22 right?

23 A That is what is implied. And if started later I
24 need to take some out.

25 Q Well, I guess under that scenario you assume that on

1 January 23rd, 1998, he would leave his job and replace Mr.
2 Walls, is that the assumption to get --

3 A Not especially, but that would be implied when I
4 made that calculation. And like I said, if it would have come
5 later that needs to be adjusted.

6 Q Can you run an average or can you run an estimate of
7 loss if, in fact, you make these assumptions? If you will,
8 assume that the clerk job pays \$40,000.

9 A All right, sir.

10 Q Assume he started filling that job in the year 2000.

11 A January 1, 2000?

12 Q January 1.

13 A All right.

14 Q Now, how does that change or would it change at all
15 these numbers that you have given us?

16 A Well, it would reduce his past losses, obviously, in
17 both instances, because I would assume he has not worked.

18 Q But if you make that assumption then what would
19 those numbers that you just gave us change to?

20 A The first number was 120,314, right? 120,314? If
21 you take the 40,000 and multiply that by .693 --

22 Q What we are doing now is we are using this number
23 instead of using 75 percent of the formula?

24 A No, understand something, please. That 75 percent
25 does not figure into any past losses. That just --

1 Q I am talking about future losses now.

2 A No. Right now I am just asking -- I am answering
3 your question about what would have happened to his past
4 losses. That is the only thing I know right now.

5 Q Well, wouldn't they be the same up until --

6 A No, no. You said you wanted me to assume that he
7 would have done this January 1 of 2000, so obviously if he's
8 working in 2000 his past losses are going to be less than I
9 have calculated, correct?

10 Q Correct.

11 A That is what I am going to do first, for you.

12 Q Do that first.

13 A That 120 would go to 92,594, that was under scenario
14 A.

15 Q Well, let's stick with scenario A while we are
16 working on that.

17 A Okay.

18 Q What would that future wages be if you used that
19 amount instead of the 25 percent?

20 A All right, sir. The 39 -- well, the 38,195 would be
21 contrasted with 27,720.

22 Q And what numbers are those representative of,
23 please, sir?

24 A It would be the after tax incomes for the two jobs.

25 Q Would be what?

1 A \$10,475 difference.

2 Q I am sorry, how much?

3 A 10,475.

4 Q Between the --

5 A The net incomes of the two jobs that you asked me to
6 assume.

7 Q The two jobs being the railroad clerk job and the
8 railroad conductor job, correct?

9 A That is correct. 173,694.

10 Q That is 173,694?

11 A That is correct, sir.

12 Q Now, is it correct the insurance would be a wash
13 because if you are a railroad employee you have railroad
14 insurance?

15 A Under your hypothetical, that is correct.

16 Q Were you aware of any other -- were you aware of any
17 actual employment that Mr. Kirkland had?

18 A Since his injury?

19 Q Since his injury.

20 A I have not been made aware of any at this point.

21 Q So your assumptions were made on the fact that he
22 had had no income, but that a lady, Ms. Kessler, said he might
23 be able to earn about 25 percent of what he earned before; is
24 that right?

25 A In the future, that is correct.

1 Q And so I guess it stands to reason if the underlying
2 assumptions change with reference to employment or injury
3 capacity then the numbers change, is that fair?

4 A Certainly.

5 MR. GARLAND: That is all.

6 THE COURT: Any redirect?

7 MR. WETTERMARK: Yes, sir, a few questions.

8 REDIRECT EXAMINATION

9 BY MR. WETTERMARK:

10 Q Dr. Johnson, the gentleman asked you about the times
11 you have testified for my firm and other firms, when you made
12 these economic calculations does it make a difference who
13 provides the numbers to you?

14 A No, sir.

15 Q Whether they come from me or Mr. Childs or Mr.
16 Garland, they always come out the same?

17 A Yes, sir.

18 Q The --

19 A It depends upon the assumptions, obviously, that I
20 am asked to use.

21 Q Sure. When you said that you -- when you made the
22 calculations where you assumed that he would -- the
23 calculations assumed that he would be able to find a job but
24 it would not pay as much as the railroad job would by, it
25 would pay roughly 25 percent of what the railroad job was --

1 A Yes, sir.

2 Q -- and you said that would calculate out to a
3 present starting salary of \$6.62 an hour. Are you saying that
4 in this other job he would make \$6.62 an hour for the rest of
5 his life?

6 A No, sir. You remember that I said that in both jobs
7 I provided wage increases.

8 Q So basically what you are saying is if he had to
9 start over again at the bottom, at 6.62, that you provided for
10 him to start getting wage increases?

11 A Certainly. By 10 years from now if he got, as an
12 example, a 6 percent annual wage he would be making 10
13 something an hour, almost 12 an hour.

14 Q I guess if he started at \$6.62 an hour and worked
15 at that job for 25 years, like he worked at his railroad job,
16 he might eventually get up to where he -- about what he is
17 making now?

18 A Certainly.

19 Q About 25 years from now?

20 A That is probable, yes.

21 Q And the calculations that you have made, the numbers
22 you have made, those are the numbers that would make up for
23 that difference?

24 A Yes, sir.

25 Q Fair enough, thank you sir.

RECROSS EXAMINATION

BY MR. GARLAND:

Q Dr. Johnson, let me ask you one other thing. In trying to make a calculation of this nature do you try to find, when you can, actual job opportunities available at certain rates, is that a better indication of an actual job offer at a certain rate, or is it a better indication of what Ms. Kessler, or somebody, might do a percentage of what she thinks he may be able to earn, which of those two is the better one in your opinion, which one makes the most sense?

A Well, that 75 percent came from her actual hourly or weekly wage rate as I recall. So, you know, they should be the same in the final analysis.

Q Well, I do not think they are, in the final analysis, because of what we have just shown. If he has a job offer and accepts it at \$40,000 a year --

A Oh, I am sorry, I misunderstood your question.

Q Which do you think -- is there a common sense way to figure this thing out, if you don't have a Ph.D., or anything else, if you have a job at \$40,000 available or you have Ms. Kessler to say you might be able to go out somewhere and earn \$6 an hour, no more than that, which of those would be the more reliable?

A Assuming he can get it. Obviously, assuming he can

1 get it, assuming he doesn't have to travel all over the world
2 to get it, assuming that he can work it without hurting,
3 assuming he can work the same 16 years that he could prior to
4 his injury, then obviously he would be better off to work the
5 40,000, but that is something that I am not capable of
6 determining.

7 Q I got you.

8 A All those other factors.

9 Q I got you.

10 A Thank you.

11 THE COURT: Thank you, Dr. Johnson.

12 THE WITNESS: Thank you, sir. May I be excused?

13 THE COURT: Yes, sir. You may be excused. Mr.
14 Wettermark, what do you have next?

15 MR. WETTERMARK: May I have one second to talk to
16 Mr. Childs?

17 THE COURT: Yes, sir, you may.

18 MR. WETTERMARK: Your Honor, with the exception
19 of Dr. Kessler who, I think we informed the Court, will
20 be here at 9:00 tomorrow, we will rest with the exception
21 of her testimony.

22 THE COURT: Okay. Ladies and Gentlemen, the
23 attorneys informed me earlier that this one witness for
24 the Plaintiff that is scheduled to be here in the morning
25 at 9:00 o'clock, in the event we finished earlier enough

1 today to continue, Mr. Garland is agreeable to proceeding
2 with the defense case so we could use this time today and
3 then take Dr. Kessler, in effect, out of order, out of
4 turn in the morning first thing. So with that
5 observation, Mr. Garland, are you ready to proceed?

6 MR. GARLAND: Ready, Your Honor.

7 THE COURT: You may do so.

8 MR. GARLAND: Call Mr. John Chapman to the stand.

9 JOHN L. CHAPMAN

10 Witness having been first
11 duly sworn, testified on

12 DIRECT EXAMINATION

13 BY MR. GARLAND:

14 Q Give us your name, please.

15 A John L. Chapman.

16 Q Mr. Chapman, where do you live?

17 A I live at Forest Park, Georgia, 5097 Maple Street.

18 Q And by whom are you employed?

19 A Norfolk Southern Corporation.

20 Q What is your title there in the Atlanta area?

21 A I am a general yard master, Terminal Trainmaster.

22 Q Is that in Atlanta?

23 A Yes, sir, in Atlanta, Georgia.

24 Q How long have you been with the railroad?

25 A I have been a supervisor since '85, but I worked for

1 the railroad in '73, for Maintenance Away Department and was
2 laid off and had to get other employment and then later I came
3 back to the railroad.

4 Q Where were you born and raised?

5 A Mullens, West Virginia.

6 Q Did you graduate from high school there?

7 A 1970, yes, sir.

8 Q Kind of give us a thumbnail sketch after high school
9 what you did until you got to the railroad and then let's stop
10 there and then we will take the same scenario on the railroad
11 jobs.

12 A Okay, just my railroad career?

13 Q Well, before that what did you do, were you in
14 service or --

15 A Oh, I worked in the coal mines.

16 Q West Virginia?

17 A Yes, sir.

18 Q How many years did you do that?

19 A Done that two years.

20 Q And then what?

21 A I had the -- I had a short stint with the railroad.

22 Q That's right, the one you just told us about?

23 A Yes, sir.

24 Q In Maintenance Away?

25 A Right.

1 Q What is Maintenance Away?

2 A The guys that drive the spikes and handle the ties
3 and the labor work.

4 Q What after that?

5 A After that I had several, driving a truck, or
6 whatever job I could get to make money.

7 Q Then you went back on the railroad?

8 A No, sir. No, then I went to -- then I got a civil
9 service job with the Sheriff in the county where I lived.

10 Q All right.

11 A And later I attended West Virginia State Police
12 Academy. And shortly after that I got a job with the railroad
13 in their Property Protection Department, that is how I got
14 back on the railroad after the Maintenance --

15 Q What year would that have been when you got back in
16 the railroad on property protection?

17 A 1984, I think.

18 Q Where was that job located?

19 A Bluefield, West Virginia.

20 Q Go on and continue, then, on with your railroad
21 career as to what you did, where you worked and that sort of
22 thing?

23 A Well, I worked a couple of years in that capacity as
24 a property protection agent for Norfolk Southern. Shortly
25 after that a superintendent offered me a job as a yard master.

1 Q Where was this?

2 A The offer on the job was in Grundy, Virginia, but it
3 was a considerably more attractive job.

4 Q Did you move, then, from West Virginia over to
5 Virginia?

6 A Yes, sir.

7 Q And how long were you in Virginia?

8 A I was there for six years.

9 Q Where next?

10 A As best I remember it, I was transferred to an
11 outpost called Yeager, West Virginia. It is in the coal
12 fields, they deal primarily with coal.

13 Q Moved back from Virginia to West Virginia?

14 A Yes, sir. Not back home, but back into the state.

15 Q Right.

16 A After that I was -- after a couple of years at
17 Yeager I was made an Assistant Trainmaster, and my job was in
18 Williamson, West Virginia, which is the hub of the coal
19 fields.

20 Q All right.

21 A After that I was -- this would have been in
22 September of '97, I was transferred to Columbia, South
23 Carolina.

24 Q In September of '97?

25 A Yes, sir.

1 Q And what was your job in Columbia, South Carolina?

2 A Trainmaster.

3 Q Did you actually live in Columbia, South Carolina?

4 A Yes, sir.

5 Q What period of time were you a trainmaster in South
6 Carolina?

7 A I was Trainmaster there until July the 15th the
8 following year.

9 Q '98?

10 A Yes, sir, '98.

11 Q And where after that?

12 A Atlanta, Georgia.

13 Q I got you. What geographic area was served out of
14 your office in Columbia? What part of South Carolina did you
15 serve as Trainmaster?

16 A It is a huge geographical area, Columbia being the
17 center I have -- there are four main lines. I was
18 responsible for the trains and the crews that operated between
19 Columbia and Charleston, South Carolina, down to the Port
20 Authority.

21 Q How many miles of trackage were under your
22 jurisdiction?

23 A Nearly 500 miles of main line track.

24 Q Do you know Mr. Lester Kirkland, the Plaintiff, in
25 this case?

1 A Yes, sir. But the area you asked me about earlier
2 is considerably large than just Columbia to Charleston.

3 Q So where would it go?

4 A Well, I also had responsibility on the line that Mr.
5 Kirkland worked between Augusta and Columbia. We also worked
6 and serviced people, of course, in the Columbia area. We also
7 worked up to near the North Carolina line up toward Columbia.
8 I am sorry, up toward Charlotte. Anyway, that is pretty much
9 the geographical area.

10 Q How many industries did you serve in that territory,
11 do you have any idea?

12 A In excess of 150.

13 Q You do know Mr. Kirkland, who was a conductor there
14 out of Aiken?

15 A Yes, sir.

16 Q Are you familiar with Operating Rule 581 that we
17 have talked about in this case?

18 A Yes, sir.

19 Q Have you always had the rulebooks with you in your
20 railroad career?

21 A Yes, sir.

22 Q In your railroad career have there been meetings and
23 so forth emphasizing the rules and that sort of thing?

24 A Yes, sir. Yeah, we have an annual rules meeting
25 that all the people, all the employees are tested on, as are

1 the supervisors on the scene, set of rules. And we have --
2 we talk -- we have safety conferences and huddles, talks as
3 we go.

4 Q How about Safety Rule M, are you familiar with that?

5 A Yes, sir.

6 Q Let me show you, Mr. Chapman, Defendant's Exhibit 4,
7 and is that a correct copy of Safety Rule M?

8 A Yes, sir, it is.

9 Q And what does Safety Rule M provide with reference
10 to employee safety? What does it say?

11 A That the employee is expected not to do anything
12 that would jeopardize his own safety.

13 Q Or the safety of anybody else?

14 A Yes, sir, or the safety of anybody.

15 Q Now, how about Rule 851, are you familiar with Rule
16 851?

17 A I can not -- yeah, the 500 Conductor Rules?

18 Q Right.

19 A Yes, sir.

20 Q What does that rule state? Does it state who is in
21 charge of trains?

22 A Yes, sir, that must be understood, because that
23 becomes -- occasionally we have a problem with that, but the
24 conductor is in charge of the train and he is responsible for
25 the safe operation and movement and that the train will not

1 move until it is safe to do so.

2 Q And, finally, Rule 586, is that another rule in the
3 conductor area?

4 A Yes, sir.

5 Q What does that provide with reference to the
6 conductor's duties concerning the cars in the consist.

7 A That if a car is found on the line of road, an
8 industry, it will not be moved until it is safe to do so.
9 That if the car is found unsafe that it will not be moved.

10 Q And that language, consist, what does that mean?

11 A The train. We make a train -- we have a marker on
12 the rear and an engine on the head end of a cut of cars and it
13 consists of a train.

14 Q Can you give us some approximation of how often in
15 your career as trainmaster a conductor would, under that rule,
16 make a decision not to pull a car or take a car out of a
17 consist?

18 A Yes, sir. In my experience weekly under this rule.
19 For one reason or another, either a mechanical problem, a
20 problem with the customer, who is loading the car, like in
21 this case, or mechanical brake defect.

22 Q I got you.

23 A That happens fairly routine. Now, the problem with
24 the customer is not as routine as the mechanical failures, but
25 they both happen.

1 Q Mr. Chapman, prior to Friday, January 23rd of 1998,
2 were you ever notified in your capacity as Trainmaster there
3 by anyone of any problems at the Grace and Company with
4 reference to kaolin not being blown off properly from the
5 cars?

6 A Well, no, sir. No, not before this incident with
7 Mr. Kirkland.

8 Q Now, do you know prior to this incident with Mr.
9 Kirkland on January 23rd, 1998 if there had been any railroad
10 injuries occasioned by the cars there at the Grace plant, do
11 you know?

12 A No, sir, I am not aware of any.

13 Q Now, with reference to Friday, January 23rd -- let
14 me first --

15 MR. GARLAND: May I approach the witness, Your
16 Honor?

17 THE COURT: Yes, sir.

18 Q MR. GARLAND: -- show you a document, that
19 document is Defendant's Exhibit 1. What is that?

20 A This is Form 22 that is -- when any type of injury
21 is sustained by an employee will be filled out, if possible,
22 by the employee.

23 Q And that was filled out and signed by what employee?

24 A L. E. Kirkland, Jr.

25 Q And is that the report that Mr. Kirkland has talked

1 about and others have talked about, the report of his injury,
2 on Friday, the 23rd of January?

3 A Yes, sir.

4 Q Now, let me show you a document identified as
5 Defendant's Exhibit 6, what is that, please?

6 A This is a required piece of information, a report,
7 that is inspection of a freight car in connection with a
8 personal injury.

9 Q Was this the inspection of the freight car involved
10 in the incident on January 23rd?

11 A Yes, sir.

12 Q Does it describe a condition found by the inspection
13 there, on the form itself, of the car?

14 A Yes, sir, it shows no exception. It shows the
15 condition of the car is good with no exceptions.

16 Q Now, when there is an injury reported that involves
17 a car, tell us whether or not there is any sort of
18 investigation that is carried out and, if so, explain that to
19 the jury, please.

20 A Okay. It is a standard, we only do the same -- we
21 are going to do the same routine every time we have an injury,
22 and I have been involved in maybe a dozen of them. The first
23 thing you do is, like you do in any first aid situation, you
24 offer assistance. You first want to know if the guy is in a
25 position where he needs immediate attention. After you

1 resolve that fact and either go to the doctor or sit down and
2 start talking about what happened, I will get from the
3 employee, whoever it was, what the facts, as best as he
4 remembers since it has just -- it is new, because we do not
5 tarry on these things, we get right at them.

6 Q You investigate the incident, is that what it is
7 called?

8 A Yes, sir. You interview the crew and then you will
9 go to the scene if possible and check the equipment, have a
10 mechanical expert come or one of our mechanical people that
11 does this every day, I don't know expert or not, but he will
12 come and do his inspection.

13 Q As part of that do you ask the employee what
14 happened and that sort of thing?

15 A Oh, yes, sir. Yes, sir.

16 Q Let me show you Defendant's Exhibit 7 and do you
17 recognize that document?

18 A Yes, sir.

19 Q Is that a summary of the findings of the
20 investigation into the incident of the 23rd of January?

21 A Yes, sir. On the Piedmont Division we had a team of
22 officers and when anybody was -- when anything of a serious
23 nature like this would happen then you would have -- you would
24 not be there by yourself, you would have other people to
25 assist with several aspects of the investigation.

1 Q Who was the team in this case, do their names appear
2 there on the second page?

3 A Yes, sir. It was Assistant Superintendent Burgess,
4 Division Road Foreman of Engines Goznell, Superintendent of
5 Terminal Roberson, Trainmaster Chapman and Road Foreman of
6 Engines Marcum.

7 Q Now, did the inspection of the car 99418, what did
8 it reveal, if anything?

9 MR. WETTERMARK: Your Honor, if I could object.
10 I object, it calls for hearsay. He can ask him what he
11 saw, what he observed. I object to him asking about what
12 other people may have observed or seen.

13 Q MR. GARLAND: Well, what you saw. Let's limit that
14 to what you saw and did you prepare this report?

15 A I assisted in preparing the report.

16 Q What, if anything, did you see or report on
17 concerning the condition of the railroad? What --

18 MR. WETTERMARK: I object to the form of the
19 question. It is a compound question, it says what did you
20 see or report on, and I object. I do not mind this man
21 testifying about things he saw, but the question was
22 broader than that.

23 THE COURT: Rephrase your question.

24 Q MR. GARLAND: What, if anything, did you see with
25 reference to the equipment in question?

1 A We did go by the equipment that evening. Mr.
2 Kirkland and I, and I am not sure who else, but I do remember
3 -- I do remember being with him, because that is the point
4 that we left and went to his home. I went out when I
5 delivered him home that night.

6 Q What did you observe about the equipment, what
7 was --

8 A The -- to be honest, I may have been sent to pull
9 the tape from the engine and then met the team with Mr.
10 Kirkland. I don't think I carried Mr. Kirkland out to the
11 scene, but I took him away from it. I did notice there was
12 residue on the car.

13 Q What about the handbrake, was it --

14 A I didn't, myself, touch the car. I was told by some
15 of the team members that --

16 MR. WETTERMARK: Well, again, Your Honor, I
17 object to that, hearsay.

18 THE COURT: Sustained.

19 Q MR. GARLAND: Can you tell us what you -- what was
20 the report of the investigative team as identified in Exhibit
21 7 with reference to the handbrake?

22 MR. WETTERMARK: Again, I object. That contains
23 hearsay.

24 MR. GARLAND: He is the man that wrote the report.
25 I think he can testify --

1 THE COURT: I don't believe that would cure a
2 hearsay problem.

3 MR. WETTERMARK: That is right. Object to
4 hearsay.

5 Q MR. GARLAND: Well, let me ask you this, did you
6 personally have any part in observation of the handbrake on
7 this car?

8 A No, sir.

9 Q That's far enough. Let me ask you this, look at
10 Exhibit Defendant's Exhibit 8 and tell us what this is, if you
11 know.

12 A It is just a follow-up from Mr. Roberson.

13 Q Whose name is there at the bottom, Roberson and who
14 else?

15 A Roberson and Chapman.

16 Q And is this a document that you and Mr. Roberson
17 prepared?

18 A Some of this information came from -- we were in two
19 different places. Some of the information came from me and
20 then he compiled this information for the superintendent.

21 Q Tell us about document D-9. Tell us, number one,
22 what it is and for what reason it was prepared.

23 A The Form 22 is filled out by Mr. Kirkland, is
24 accompanied by another form that is filled out by the
25 supervisors. And the form is filled out by the supervisor is

1 condensed and entered into the computer, and this is a
2 condensed version or a computerized version of a handwritten,
3 copied report.

4 Q That is Exhibit 9?

5 A Yeah.

6 Q What about Exhibit 10, what is this?

7 A It is the same as the -- this report is -- I don't
8 know if it is identical, but it is very close to the initial
9 injury report and when the -- when the fellow changed from a
10 -- when the status of the injury changed we re-submitted a
11 report with a different heading.

12 Q You prepared this partially; is that correct?

13 A Yes, sir.

14 Q Who does this go to?

15 A It goes to the superintendent of the division.

16 Q Who is that?

17 A J. O. Wagner.

18 Q Now, these reports you just identified, are those
19 reports that are routinely prepared when there is an injury?

20 A Yes, sir.

21 Q How did Mr. Kirkland explain to you, if you recall,
22 how he fell off the car there? Do you recall his
23 explanation?

24 A Yes, sir. He had described his working condition as
25 best I remember. I know that his gloves -- he had made

1 comment of his gloves being wet. And I think that he made
2 reference to the clay on the car. But when he started
3 describing his injury I asked him -- I tried to figure out the
4 dynamics of how you fall. I was the first responding officer.
5 I found out that he was not requiring -- I offered medical
6 assistance, he did not require it. He declined.

7 Q What did you really say with reference to offering
8 medical assistance? What that night -- this is Friday the
9 23rd.

10 A Yeah.

11 Q Tell us about any conversations you had with Mr.
12 Kirkland --

13 A Well, I will tell you, it is three years ago and I
14 have moved from that area and to another area with another 200
15 customers and I do not remember a lot of these conversations
16 word for words. But I do know that the first thing I would
17 have done after I found out that he was okay and that he did
18 not need any medical assistance at the time, the first thing
19 we would have done is started talking about how he got to
20 where he is right now.

21 Q Did you ask him that night if he needed to go see a
22 doctor?

23 A Yes, sir.

24 Q Do you remember what he said?

25 A He said he did not need a doctor.

1 Q Now, did you talk to him during the weekend of the
2 24th and 25th, Friday and Saturday, so you recall?

3 A No, sir, I do not recall, but I do not think I did.

4 Q When did you next see Mr. Kirkland?

5 A I saw him mid morning on Monday.

6 Q That is the 26th?

7 A Yes, sir.

8 Q Tell us just, if you will, where he was, what you
9 did, what you said, you know. Give us just a recap of what
10 happened that Monday morning.

11 A I had -- I had picked him up off of his engine, as
12 we described earlier, where the engine failed, so I -- when I
13 heard he was there I went -- I left the plant and went to
14 him. And picked him up, we went back to the plant, we
15 talked about the operation a little bit and looked around the
16 plant.

17 Q That is the Grace and Company plant?

18 A Yes, sir.

19 Q Did you talk to anybody from Grace and Company
20 there, do you recall?

21 A Well, my first move Monday, of course, is to go to
22 -- my first move was, since I was in the area I went
23 straight to the plant, because that was my next -- that was
24 my next place I needed to see. Mr. Kirkland is going to be
25 at work and he thought he was going to be all right and time

1 would tell. And we went to -- well, I went out to the plant
2 and --

3 Q Monday morning?

4 A Monday morning. -- and took a little walk and
5 looked around.

6 Q All right. Did you talk to anybody there at Grace
7 and Company then, or do you recall?

8 A The only person I ever talked to at Grace and
9 Company was the load out man, the guy -- and I am not familiar
10 with all the names of these fellow that worked outside. But
11 the man I talked to, I was just explaining to him that we had
12 had an incident and that these cars could not be pulled unless
13 the and I didn't say the car to be cleaned, I told him that
14 the walking area and the ladders had to be clean to where we
15 could work on them without slip sliding.

16 Q And what did he say?

17 A He said that they did the best they could do and
18 they worked on these cars every day before we pulled them.

19 Q It was raining on Friday; is that right, the 23rd?

20 A It was raining when I caught up with Mr. Kirkland,
21 yes, sir.

22 Q Do you remember was it raining or not on Monday, the
23 26th?

24 A No, it was not.

25 Q Tell us, back now, you caught up with Mr. Kirkland,

1 and what, did the two of you have a conversation?

2 A Well, I heard testimony that I got up on the engine
3 and talked to him, which is probably what happened. I don't
4 remember getting up on the engine but I get up on a lot of
5 engines, is what I do, and talk to crews. But me and Mr.
6 Kirkland did take a ride over to the property where Grace is.
7 And during that conversation I am sure the topics were his
8 health, first of all, when we were not talking railroad we
9 would maybe talk a little bit of golf or --

10 Q How did he describe his health that Monday morning
11 when you saw him?

12 A Well, my observation was I saw -- I did not see
13 anything, but -- I mean, I did not see a limp. And when I
14 asked him about his hand he would show me one of these, but he
15 is going to tell me that he is reliable for service, because
16 if I think he is not I am going to send him home.

17 Q And he was back on service that Monday morning?

18 A He was back at work, yes, sir.

19 Q Go ahead.

20 A The conversation would have been about his
21 well-being. And, of course, he is talking about -- at this
22 point he is talking about Grace, I am asking the questions
23 about the service. He knows at this time I have only been on
24 the property maybe four or five months. I spread myself as
25 thin as I could learning 75 crew members in Charleston and 100

1 crew members in Columbia. I had not had -- maybe one time
2 that I had went by myself just hunting out all the little back
3 roads and where these industries are located to figure out
4 where I was at myself. So I was getting my information from
5 Mr. Kirkland, because he is -- he is the authority on that
6 particular location.

7 Q Tell us what else was, if anything, was said between
8 you and Mr. Kirkland and then what next happened that Monday
9 as you recall?

10 A Well, I remember taking him back, I take him back
11 and put him with his crew. I don't remember if it is at the
12 road crossing or not, but I put him with the crew.

13 Q Where did you then go from there, do you recall?

14 A Well, there is -- yeah, I went down down in the
15 valley, down on the river -- oh, I started that morning
16 pretty early. I went to get something to eat, I do remember
17 that. And I -- looking at industries, I suppose. I mean,
18 just normal course of duties. I did not have another crew
19 working, but I had a lot of areas that I was not real sure
20 about between there and Augusta, so between there and the
21 river.

22 Q When did you next see or hear from Mr. Kirkland on
23 Monday the 26th?

24 A I was called back to the -- I was called back to the
25 depot to meet with the crew.

1 Q This is the Aiken Depot?

2 A Yes, sir, in Aiken.

3 Q Had they left Aiken and gone to Grace and come back
4 or --

5 A Yes, sir.

6 Q Okay.

7 A Yeah, they were almost at Grace that morning when I
8 talked to Mr. Kirkland about -- whatever time that was.

9 Q Did you have any telephone conversations with him
10 between the time you were telling me about seeing him and
11 talking to him and the time you were called back to the depot
12 in Aiken?

13 A No, sir.

14 Q Any radio, two-way radio conversations?

15 A No, sir.

16 Q So what, then, the next encounter with him, was that
17 your meeting at the depot there in Aiken?

18 A Yes, sir.

19 Q What was the nature of the call or did you know?

20 A Well, no, I did not know -- I did not know until I
21 walked in the office. And he explained to me that -- well, he
22 said that -- I can not remember the term about his back. He
23 said his back was tightening up. He told me it was tightening
24 up. And I asked him, do you need to go to the doctor, are you
25 able to go. And he said, well -- at that time he refused

1 medical attention. He did not want to go to the doctor.

2 Q Did he remain on duty, or what happened?

3 A The day was shortened. I don't remember if he done
4 it -- I don't remember if he performed in on service after our
5 conversation or if he -- if he just told the brakeman to put
6 the train away. I don't remember that myself.

7 Q Did he tell you at that time he had slipped on the
8 car?

9 A Yeah. He told me that he had gotten up on a car,
10 which the first thing I -- well, he said he had gotten up on a
11 car that had this residue on it and his foot slipped and his
12 back was tightening up on him. And he had told me at that
13 time if the tightening persisted or pain, I can not remember
14 which way he said it, it is in the report, but he said if it
15 persisted he did not know if he was going to be able to work.

16 Q And what did you do then?

17 A I would say I sent the crew home. I mean, I am just
18 we can look at the records -- you can look at the record and
19 see how much time they made that day -- but it was probably
20 getting up near the five, six hour on duty, and being the
21 situation I was in I felt I was better off letting Mr.
22 Kirkland go home.

23 Q Did Mr. Kirkland call you or tell you, ask your
24 advice about whether he could leave a car at the Grace and
25 Company that day?

1 A No, sir, he did not. We had covered that the
2 night-- on Friday, the night he got hurt, the initial 23rd
3 deal, we covered, not verbatim like we did here with these
4 rules, but it is understood and has always been understood the
5 conductor has the authority and the right, the ability, the
6 obligation to leave a car that is not fit to run at the plant.
7 And the reason being, we are not set up to clean up
8 everybody's cars and make everybody's cars mechanically sound.

9 If they are our cars we are going to repair them
10 mechanically. But if a man has scrap hanging over the side of
11 a car and we let it go down the road and somebody on another
12 track gets sideswiped or -- in this case if we just set the
13 car out and somebody got hurt down the road -- we don't move
14 cars from customers. That is their problem and we don't want
15 it on our railroad if it is not right.

16 Q Have you disciplined a conductor for taking a car
17 out of a consist and leaving it somewhere?

18 A No, sir.

19 Q Were there any other meetings that you had with Mr.
20 Kirkland that day now, on Monday, the 26th, that we have not
21 covered?

22 A No, sir.

23 Q When did you -- did you see him the next morning,
24 the 27th?

25 A I went to -- I remember talking with him in Mr.

1 Roberson's office in Columbia.

2 Q Did you take him to the doctor?

3 A No, sir, I did not.

4 Q Who took him, do you --

5 A I know Mr. Roberson went. I don't know of Mr.
6 Marcum went with them or not.

7 Q Do you know when that was? Was that Monday the 26th
8 or Tuesday, the 27th?

9 A No, no. Monday after work, after he said his back
10 was tightening up, they went home. He reported back to work
11 on Tuesday morning and he called the office in Columbia and
12 reported that he was not going to be able to work, that he
13 wanted to see a doctor.

14 Q Okay.

15 A And we got him to the doctor.

16 MR. GARLAND: I believe that is all I have.

17 THE COURT: Mr. Wettermark, we are going to take
18 a short break before we proceed with the cross
19 examination.

20 MR. WETTERMARK: That is great.

21 THE COURT: We will resume in just a few minutes.
22 We will be in a short recess.

23 (COURT IN RECESS)

24 THE COURT: Mr. Wettermark, you may proceed.

25 MR. WETTERMARK: Thank you.

CROSS EXAMINATION

BY MR. WETTERMARK:

Q Mr. Chapman, you sir, are an official of the Norfolk Southern Railroad Company, aren't you?

A Yes, sir.

Q Would you agree with me that having kaolin on grab irons of cars is an unsafe situation?

A Yes, sir.

Q It's not just a little bit unsafe, it's terribly unsafe?

A It's unsafe. I don't know if there's a degree.

Q You know from your experience working for the railroad that these grab irons, these walkways, these are structures that these men rely upon as a matter of life and death to keep them safe?

A Yes, sir.

Q And to have kaolin on them puts them at risk, doesn't it?

A Yes, sir.

Q Terribly unsafe?

A Yes, sir.

Q You have heard the testimony in this courtroom about how long that situation went on, haven't you?

A Yes, sir.

Q If this situation lasted as long as we heard in this

1 courtroom, would you agree with me that Norfolk Southern
2 Railroad Company failed to provide this man a safe place to
3 work?

4 MR. GARLAND: I object to the form of that
5 question, Your Honor, all that "this situation" and all
6 this; this is just such a --

7 THE COURT: I overrule the objection.

8 MR. GARLAND: It's an open-ended question.

9 Q Mr. Wettermark: Would you agree with me, if
10 indeed these men, for nearly eight years, had been going to W.
11 R. Grace and having kaolin on the grab irons and walkways time
12 after time after time, would you agree with me that someone
13 dropped the ball?

14 A It's never happened on my term -- on my watch, so --
15 but I would agree that that's a situation that should have
16 been corrected.

17 Q It happened one time on your watch, didn't it?
18 February 23rd, didn't this man get hurt when he slipped off
19 the car?

20 THE COURT: You mean January?

21 Q Mr. Wettermark: January 23rd, I am sorry. I
22 will slow down.

23 A Okay.

24 Q That was on your watch, wasn't it?

25 A Yes, sir.

1 Q And didn't Mr. Kirkland fall off a car because of
2 clay on it?

3 A I don't think so.

4 Q You don't think so?

5 A No.

6 Q Were you out there?

7 A No. You asked me a question what I thought. I was
8 just going to tell you why I thought he -- if you want to know
9 why I think he fell, it didn't make the report, because it's
10 not based on any -- the problem being when I asked Mr.
11 Kirkland did he slip off the car, we was talking about the
12 feet and the hands type thing -- I deal with dynamics of
13 people mounting cars and dismounting cars, handling switches.
14 Okay? When you asked me the question, if Mr. Kirkland's feet
15 had slipped out from under him, I would have considered Mr.
16 Kirkland to went down where he was, if your feet slip out from
17 under you. If you are handling -- in this situation, if he
18 was handling the brake, I don't think he would have sprung
19 away from the car the way he told me he went -- 12 feet on the
20 fall.

21 Q When did he tell you he went 12 feet from the car
22 when he fell?

23 A Well, I heard that testimony.

24 Q You heard Mr. Kirkland tell these people that he
25 fell 12 feet away from the car?

1 A Oh, no, no, no. But he was -- when he explained to
2 us how he left the car, he -- the investigation reveals that
3 he didn't fall right beside the car, that it was like he was
4 kind of sprung away from the car.

5 Q When he explained to you all, did he explain to you
6 that he had slipped in clay?

7 A Well, he said there was clay on the car.

8 Q Did he tell you he slipped in the clay?

9 A He told me that his hand slipped off the brake
10 wheel.

11 Q Do you recall him telling you that the reason he
12 slipped off this car was because of clay?

13 A I -- he said there was clay on the car. I don't
14 remember him saying, this clay is everywhere, and I wouldn't
15 have fell. He told me it was raining, his gloves were
16 soaked.

17 Q Well, let's not go on your recollection. That night
18 there at the Aiken Depot, wasn't he required, as part of his
19 job, to fill out an accident report?

20 A Yes, sir.

21 Q You were his immediate supervisor, weren't you?

22 A But I didn't have him fill that report out.

23 Q Did you look at the report?

24 A Well, it's been in the file; yes, sir.

25 Q Did you review the report?

1 A Oh, yes, I had to send all of them to the
2 Superintendent.

3 Q And in his report, didn't he put, "while releasing
4 hand brake on cover topper loaded with clay, slipped on clay
5 on topper and fell to ground"?

6 A Well, he didn't tell me that.

7 Q He didn't tell you that?

8 A No, sir.

9 Q I see. Did you -- you told this jury that you went
10 out to the scene afterwards, and -- I think Mr. Garland was
11 asking you questions, but I think you told him that when you
12 checked out the car out there at Warrenville, that -- tell us
13 again what you saw when you were out there.

14 A Well, it was at the edge of dark at this time.

15 Q Yes, sir.

16 A We looked around the -- you know, I can remember
17 walking up the track, the length of the track and there were
18 other officers there, I don't remember exactly which ones of
19 the five of us. The only thing I observed that was of any
20 consequence was that I couldn't see where anything had hit the
21 ground, and that there was a little bit of clay on the car.

22 Q You did see the clay on the car?

23 A Well, I am talking about on the -- you know, I never
24 said that there wasn't clay on the car.

25 Q Was there clay on the grab irons?

1 A There was a -- where we were, there was a -- like a
2 thin layer of dust of this stuff, but it had been raining all
3 day.

4 Q Well, describe how thin a layer of dust it was that
5 you saw that night when you went back to the scene.

6 A What do you mean how thick? I mean, I don't know
7 the milliliters, but it's like a dusting, it's not -- it's not
8 a thickness, it's just -- let's say, like a dirty windshield
9 type -- you know, just a --

10 Q Did Mr. Kirkland ride with you out to the scene?

11 A No, sir. Not that I remember. I remember taking
12 him home, but I don't remember how we got to the scene.

13 Q Mr. Chapman, do you recall that I took your
14 deposition just one week ago?

15 A Yes, sir.

16 Q You were under oath then, didn't you?

17 A Yes, sir.

18 Q Do you recall that I asked you at that time whether
19 you had gone back to the scene that night?

20 A Yes, sir.

21 Q And didn't you tell us, sir, under oath, that you
22 hadn't gone back there?

23 A Well, I tell you what. I also told you that you had
24 me tes --

25 THE COURT: Hold on, wait a minute now.

1 THE WITNESS: Oh, I'm sorry.

2 THE COURT: Just answer his question.

3 THE WITNESS: Oh, yes, sir.

4 Q Mr. Wettermark: You did, under oath, you said, I
5 didn't go back to the scene?

6 A Well, I didn't remember going back. And I had
7 answered that way several times, because I didn't remember.

8 Q I see. And you have remembered since last week?

9 A Well, I have sat through a lot of testimony, and I
10 got an opportunity to read all the reports. The reason I do
11 the reports is so I'll know what happened three years later,
12 hopefully.

13 Q What are you telling us, sir? Are you saying that
14 you remember going back to the scene now?

15 A No. I remember when a man told me -- when they
16 started talking about getting Mr. Kirkland back home, I
17 remembered taking Mr. Kirkland from that location and going to
18 his apartment.

19 Q But you didn't remember that last week when I asked
20 you if you went back to the scene?

21 A No, I didn't.

22 Q In fact, you said several times, under oath, I
23 didn't go back there that night?

24 MR. GARLAND: What page are you on?

25 A The Witness: I don't know that. I don't know that

1 I said I didn't go back there that night, but I didn't
2 remember going back there that night.

3 THE COURT: And if you would refer to a page in
4 the deposition when you do use it.

5 MR. WETTERMARK: Yes, sir, page 23.

6 Q Mr. Wettermark: Let me ask you this specific
7 question, sir. Didn't I ask you, when you were under oath,
8 just one week ago, page 23, question, "At any point in time,
9 did you or anybody else go with Mr. Kirkland back to the scene
10 of the accident"? And was not your answer, "I -- I didn't. I
11 don't remember being at the scene of the accident with Mr.
12 Kirkland"?

13 A I didn't -- no, sir. I didn't. At that time, I
14 surely didn't.

15 Q So what you are saying is you have remembered it
16 since then?

17 A Well -- yes, sir.

18 Q Let me ask you about something. When you first got
19 there did you go check out Mr. Kirkland's injuries? That
20 Friday afternoon, when you first got to the Aiken Depot,
21 when you learned he was hurt did you go check out his injury?

22 A Yes, sir. Yes. He was in the room, that was the
23 reason I came down there.

24 Q Sure it was. Did you go look at his hand?

25 A Yes -- well, yes. I asked him about his hand, that

1 was the obvious injury. I mean, he was showing me his hand.

2 Q Did you look at it?

3 A Well, yes, sir.

4 Q What was wrong with it?

5 A Well, I didn't notice anything -- I didn't notice
6 anything particular.

7 Q Didn't see any bruising or swelling?

8 A No broken bones.

9 Q Didn't see a thumb that was deformed?

10 A No, sir.

11 Q Nothing like that that day?

12 A No, sir. And when I started asking him, I said, you
13 know, can you use it. And he would do this (indicating).

14 Q As I understand it, did you ever tell him, Mr.
15 Kirkland, we want you to work with us so this won't be a
16 reportable accident?

17 A No, I never used that. I'm not --

18 Q Did anybody else say that to him?

19 A Not in my presence.

20 Q Not in your presence?

21 A No, sir.

22 Q Did anybody put ice on his back?

23 A Ice is available, and there was -- and he did have
24 ice, but I am not the doctor. I don't -- you know.

25 Q Did anybody put ice on his back, sir?

1 A I didn't. I don't remember anybody putting ice on
2 his back.

3 Q Anybody put ice on his hand, sir?

4 A I remember him carrying an ice bag as we went home.

5 Q Do you remember any of the other officials sitting
6 there making jokes, saying, oh, Dr. Roberson, you do this, Dr.
7 Chapman, you do this?

8 A No, sir.

9 Q That didn't happen?

10 A No, I don't -- I don't remember that. I wasn't -- I
11 don't remember any tomfoolery around an injury.

12 Q This following Monday morning -- let me ask you
13 this: Do you recall, sir, that on that Friday evening, Mr.
14 Burgess told you that he wanted you to go out to W. R. Grace
15 that following Monday and get this situation squared away?

16 A No, sir. I don't remember him telling me that.
17 But I do remember going straight to W. R. Grace Monday
18 morning.

19 Q Oh, so just coincidentally, you went to W. R. Grace?

20 A No, no. I am not saying that. I am just telling
21 you that I don't remember Mr. Burgess point blank telling me
22 to do that.

23 Q Is it your testimony, sir, that this crew did not
24 call you while they were at W. R. Grace and ask you to come
25 out there and come and see for yourself the problem with the

1 cars?

2 A Yes, sir, that's true.

3 Q Now, tell me again; when did you go to W. R. Grace
4 that morning?

5 A First thing. It's an hour and a half drive or so
6 from Columbia. I am not sure if I got up at 6:00 or 5:00, or
7 whatever, but my first move of the day was to drive to Aiken
8 and -- to drive to the place where the man loaded the cars and
9 talk to the people there.

10 Q What time did you get there?

11 A I would say around 8:00 -- 8:00 o'clock, or
12 somewhere in that neighborhood.

13 Q Who did you talk to when you got there?

14 A The fellow who operates the load out there at W. R.
15 Grace, the guy who does the work.

16 Q Who was that?

17 A Oh, I don't know that.

18 Q How did you know who he was?

19 A Well, it's -- he was working in an industry scene;
20 he is -- they are there working.

21 Q Was he a front-end loader operator?

22 A No, no, no. He was working around the railroad
23 cars, right there where they load, and clean them off.

24 Q Just go up and talk to somebody you saw walking
25 around there?

1 A No. The guy that was -- appeared to be in charge of
2 the group of people working, like the dock master or the guy
3 on the dock.

4 Q You don't know his name?

5 A Oh, no, sir. I sure don't.

6 Q What was his position?

7 A He was a worker there at the -- a loader, I guess,
8 or -- I don't know what their titles are, but he was a worker
9 there at Grace.

10 Q Did you ask, "I want to talk to the man in charge?"

11 A Oh, no, no, I didn't do -- I never talked to the man
12 in charge.

13 Q Why did you go out there that morning?

14 A To talk to the people who cleaned the cars and
15 loaded the cars to try to eliminate the potential problem.

16 Q And the problem was clay being on the grab irons?

17 A Yes, sir.

18 Q Well, why didn't you go to the bossman?

19 A The bossman don't load or clean the cars.

20 Q Well, did you talk to all the people who load and
21 clear the cars?

22 A Well, the guys that were -- the people that were out
23 there on day shift, I talked to a couple of guys that were
24 there that were loaders.

25 Q Well, Mr. Chapman, if you are going to a business to

1 try to correct an unsafe situation, doesn't it make sense to
2 go talk to the man in charge and not just talk to the one of
3 the guys working on the dock?

4 A Well, in the industry, the people who do the work
5 are the people I usually deal with. I generally don't deal
6 with the people in the top of the building in the back office.
7 I deal with the people that are on the dock. I am a front
8 line supervisor. I don't -- I wear cotton pants and boots to
9 work, and gloves.

10 Q Well, when you left there, what assurance had you
11 been given that there wouldn't be this problem any more with
12 clay being on the cars?

13 A Well, they told me that they had a way to clean the
14 cars off and they would do the best job they could.

15 Q Who told you that?

16 A The gentlemen who do the work at the plant.

17 Q What about the guys on second shift? Who was going
18 to tell them to do it?

19 A Well, I'm not -- I don't know. I don't know if we
20 -- I don't know.

21 Q What about the people on third shift; who would have
22 told those workers on the dock to clean the cars off?

23 A Well, I don't know that they load three shifts, but
24 be that as it may, I didn't talk to anybody on the second
25 shift or the third shift.

1 Q Wouldn't it have made sense to go talk to the man in
2 charge so he could make sure that the message got delivered to
3 all three shifts?

4 A The standard would be that we wouldn't move the cars
5 if they weren't right; that's what makes sense.

6 Q And you are telling us that Mr. Kirkland and his
7 crew didn't call you back later on that morning and say, get
8 out here, we are not moving these cars because they are so
9 covered with clay?

10 A I went to the plant. I went and talked to the crew
11 -- me and Mr. Kirkland rode around a little bit. And after
12 that, the next time I remember talking to the crew was back at
13 the Aiken Depot when I was called to come back there.

14 Q Well, let me ask you -- I'm going to ask you to go
15 forward a little bit in time.

16 A Okay.

17 Q After you got back to the Aiken Depot, after you
18 found out that Mr. Kirkland had hurt himself again --

19 A Yes, sir, aggravated himself, yes.

20 Q You saw the cars then, didn't you?

21 A Yes, sir.

22 Q And you saw them covered with clay, didn't you?

23 A Yes, sir.

24 Q Did you go get in your car and go back down to W. R.
25 Grace, and say, look, I was just here a few minutes ago, and

1 you sent cars out, just like you said you wouldn't?

2 A No. No. I made some exclamation to the crew,
3 because I was upset that they even pulled the cars to begin
4 with. We had just been through this Friday night.

5 Q Where did these cars go after Mr. Kirkland got
6 hurt?

7 A Same place they went on the 23rd. They go to be
8 switched, classified from Warrenville and then outbounded.

9 Q What do you mean, they go -- they went to
10 Warrenville like that?

11 A Like what?

12 Q With clay all over them?

13 A Well --

14 Q Have you seen these pictures?

15 A I saw some pictures yesterday.

16 Q Do you see this engine with clay all on the running
17 board?

18 A Yes, but I didn't notice any clay on the running
19 board when I was there that day.

20 Q Oh, so you didn't see any of this clay that day?

21 A No, sir. I didn't say that. I said I didn't see no
22 -- there's clay all over that engine. I didn't see that. We
23 use that engine every day at that job. It don't go out of
24 there, it stays there for a week. Tomorrow, we are going to
25 get back on that engine, and nobody said anything about that

1 engine to me.

2 Q Are you telling this jury that when you went out
3 there there wasn't clay all over this engine like this?

4 A No, sir. I said I didn't see it.

5 Q Well, let me show you this picture.

6 A I didn't go to look at the engine, I went to see the
7 employee.

8 Q Did you see a car that had this much clay on it?

9 A Well, from my vantage point, you can't -- you have
10 got to get up on the car to see that. You can't see that
11 standing on the ground.

12 Q Well, what are you telling us? Are you telling us
13 you didn't go look at the cars?

14 A Well, I looked at the cars from, I guess, from
15 whenever I was at the office. I mean, what do you -- I don't
16 know when I said I looked at cars again.

17 Q Let me ask you, sir. After Ms. Kirkland was injured
18 on Monday and told you that he had slipped on the clay --

19 A Right.

20 Q -- told you that the cars that had come from W. R.
21 Grace covered with clay --

22 A Yes, sir.

23 Q -- did you not go look at the cars?

24 A On Friday night, yes, sir, I did.

25 Q No, I'm talking about on Monday. Did you not go

1 look at the cars that day?

2 A No, sir. I had to leave.

3 Q Are you telling this jury, sir, that that very
4 morning, you personally had gone out to W. R. Grace --

5 A Yes, sir.

6 Q -- talked to them about the clay problem --

7 A Yes, sir.

8 Q -- three hours later, you got one of your men, who
9 is injured --

10 A Yes, sir.

11 Q -- says that he got injured because of clay on
12 these very W. R. Grace cars, and you are telling this jury
13 that you didn't even go bother to go look at them?

14 A Well, I think I left and went to --

15 THE COURT: Mr. Wettermark, if you would kind of
16 stay over this way unless you need to approach the
17 witness for some particular reason.

18 MR. WETTERMARK: You're correct, Your Honor.

19 A The Witness: What I did, something called me away
20 and I left. And I have heard in testimony that it was a
21 crossing accident; I don't remember that. But when I found --
22 my intention was to go down there and make sure Mr. Kirkland
23 was all right. That's my first -- that's the first thing I
24 would do.

25 Q You agree with me that having clay on the cars like

1 that is very dangerous?

2 A Yes, sir.

3 Q What steps, as the trainmaster in charge, did you
4 take on that Monday, to make sure that these cars weren't
5 switched by any other trains until they were cleaned up?

6 A Well, we weren't going to work the industry again
7 until Monday morning. Before we worked the industry, I went
8 and talked to the people who loaded the cars and told them
9 that --

10 Q No, sir.

11 A -- that we wouldn't pull the cars unless they were
12 clean.

13 Q I am talking about Monday morning. After Mr.
14 Kirkland was injured that Monday, January the 26th --

15 A He was injured on Friday.

16 Q You went out on that Monday morning and talked to
17 the people at W. R. Grace; is that right?

18 A Yes, sir, that's right.

19 Q Three hours later, you got a call, come to the Aiken
20 Depot?

21 A Yes, sir.

22 Q And when you got to the Aiken Depot, you found out
23 that Mr. Kirkland was injured, didn't you?

24 A Yes, sir.

25 Q And I think you just told this jury, if I remember

1 correctly a few minutes ago, that you kind of cussed because
2 you were mad about W. R. Grace leaving the clay on the cars?

3 A No, sir.

4 Q Well --

5 A I was mad because we pulled the cars with the same
6 contaminant -- the same problem we had on Friday night when a
7 man was hurt, and we had went over the -- even though he knew
8 the policy, we had went over it on Friday, we had went over it
9 on our ride on Monday. And instead of going down there and
10 telling the guy that, no, I can't pull your cars because they
11 are dirty, he pulls the cars anyway.

12 Q Mr. Chapman --

13 A That's what makes me mad.

14 Q Are you trying to blame this man for what has
15 happened to him?

16 A No, sir. But I am telling you it wouldn't have
17 happened if he had followed the policy and not pulled the
18 cars.

19 Q Mr. Chapman, don't you know, sir, that this man
20 tried for eight years to get permission not to pull these
21 cars?

22 A No, sir, I didn't know that.

23 Q Well, what about on this night? You knew that he
24 was hurt on Monday, you knew he was hurt; is that right?

25 A Well, I knew he had a tender spot, yes, sir.

1 Q And you knew that the reason he had gotten hurt is
2 because of clay on these W. R. Grace cars, didn't you?

3 A Yes, sir.

4 Q You were the company official in charge, weren't
5 you?

6 A Yes, sir.

7 Q Did you take any steps whatsoever to take these cars
8 out of service?

9 A Yes, sir.

10 Q And how did you take these cars out of service?

11 A I didn't take them out of service. I talked to --
12 you asked me if I took any steps--

13 Q Yes, sir.

14 A I am not going to take the car out of service. I go
15 talk to -- like I told you, I go talk to the customer to get
16 him to clean his act up so he gives us a good car. I
17 reiterate to the conductor it's his authority not to pull the
18 car from a customer if it ain't right. That's how we get --

19 Q Mr. Chapman --

20 A Yes.

21 Q -- isn't it the truth of the matter, sir, that on
22 that Monday when you got back to the Aiken Depot, you found
23 out that Mr. Kirkland had re-injured himself, slipping again
24 on these cars, didn't you call a relief crew?

25 A I don't remember that. But I do remember I sent the

1 crew home.

2 Q Well, don't you remember that you got the crew to go
3 take these cars down to Warrenville to --

4 A I didn't allow the crew to take the cars to
5 Warrenville. They probably continued to work what was going
6 on. I left Aiken. I don't know where I went.

7 Q Sir, I guess that's what I am trying to find out.

8 A Okay.

9 Q Why didn't you tell this crew, don't switch those
10 cars any more; don't take them to Warrenville; they are
11 dangerous?

12 A Whatever called me away took me away in a hurry;
13 that's all I can remember.

14 Q Sir, isn't the truth of the matter, the reason that
15 you didn't take those cars out of service and the reason that
16 you allowed them to be sent down to Warrenville to be put on
17 another train is because that's what had been happening for
18 years and years and years?

19 A Well, to be honest with you, I wasn't aware of the
20 problem until Friday, so my plan for remedying all this and
21 taking care of everything else was not -- was maybe not as
22 expedient as it should have been, but no, sir. I would never
23 put a man in a situation that's dangerous, nor required him to
24 pull a car that had contaminant on it.

25 Q Can I ask you something? Did you used to work in

1 the railroad's equivalent of their police department?

2 A Yes, sir.

3 Q So you know, sir, in your experience there, you know
4 the importance of giving accurate testimony, don't you?

5 A Oh, yes, sir.

6 Q How do they blow the -- how do they blow the -- how
7 are they supposed to blow the clay off these cars?

8 A With a little hand wand, like a car wash type setup.

9 Q Have you watched them do it?

10 A No, sir. I haven't been there at the time that they
11 had finished their loading process and was going to blow the
12 cars off. No, sir. I haven't.

13 Q Are you telling us that you have never gone out
14 there and seen how they do it?

15 A No, sir. I've never seen that -- no, sir. I told
16 you I had only been out to the place maybe three times since I
17 worked there, and twice was because of this incident.

18 Q Well, there ain't no question -- there's no question
19 in your mind after that Monday that this man was injured, was
20 there?

21 A Well, I wasn't -- he had not let on to me that he
22 was injured. If an employee is limping around, he will be
23 taken out of service. He won't be able to -- he won't be able
24 to do his work; we can't have him out there hobbling. And Mr.
25 Kirkland never let on to me that he was in any situation until

1 Monday afternoon when he said his back was tightening up, that
2 he wasn't going to be able to -- he didn't think he was going
3 to be able to go. And I put that in the report.

4 MR. WETTERMARK: Give me one second, sir.

5 THE COURT: Yes, sir.

6 Q Mr. Wettermark: How did you find out -- that
7 Monday morning, how did you find out that Mr. Kirkland had
8 re-injured himself?

9 A I don't remember. I have cell phones, a pager in
10 your pocket, a radio that has about four frequencies that we
11 use. I'm not -- I don't remember. I don't remember how I was
12 contacted.

13 Q How many times have you been back to W. R. Grace
14 since that Monday?

15 A Maybe once or twice, but I left in -- I never had
16 any -- I never received any further complaints about the
17 customer or the cars, so --

18 Q I guess that's my question, though; how many times
19 -- after that Monday, how many times did you go back to W. R.
20 Grace?

21 A I don't know the answer to that.

22 Q Have you ever -- did you ever go back there?

23 A Oh, yes, sir, yes, I am sure I was back around. It's
24 part of the territory.

25 Q Just a normal courtesy type call?

1 A No. I don't -- I wouldn't call on them. I observed
2 the employees working.

3 Q Oh, you went back to see your employees working?

4 A If I was there, yes, sir.

5 Q Well, let me ask -- when was the last -- did you
6 ever go back to W. R. Grace specifically about the clay
7 problem?

8 A No, sir.

9 Q Let me see if I understand this.

10 A Okay.

11 Q You are telling the jury that that Monday morning
12 you went and talked to the supervisors there about the clay
13 problem; is that right?

14 A I talked to the fellows that work at the dock, yes,
15 sir.

16 Q And then that very afternoon, one of your men was
17 injured slipping on the slick clay; is that right?

18 A Yes. I supposed injured tightening the brake up,
19 yes, sir.

20 Q And you never went back to W. R. Grace to find out
21 about the clay problem?

22 A No, sir.

23 Q You didn't go back there the next day and raise hell
24 with them because they had ignored your visit the day before?

25 A No, sir.

1 Q Didn't go back there a week later to make sure that
2 they had stopped this habit that had caused one of your men to
3 get hurt?

4 A I didn't go back -- no, sir -- I didn't go back and
5 raise any kind of Cain with the customer, no, sir.

6 MR. WETTERMARK: That's all, sir. Thank you.

7 THE COURT: Any redirect?

8 MR. GARLAND: Nothing further, Your Honor.

9 THE COURT: All right, you may step down. What
10 do you have next, Mr. Garland?

11 MR. GARLAND: Your Honor, I was -- we have Michael
12 Maher. Now, he may be -- I don't know exactly how long
13 he would be. And of course, now, Mr. Roberson, they have
14 informed me has had an accident problem on the way. He's
15 on his way, and he's coming from South Carolina. I don't
16 know whether to start with Mr. Maher or wait until in the
17 morning.

18 THE COURT: Mr. Maher is the rehab --

19 MR. GARLAND: He's the rehab.

20 THE COURT: It's a little after 5:00, we have put
21 in a pretty full day today. The railroad -- Mr. Garland
22 has a witness he could call, it might be hard to say how
23 long it would take. Of course, the goal is to try to be
24 sure we can get it to you tomorrow afternoon. And if we
25 got in one more witness today, that would help us be a

1 little more sure that we'll have it to you tomorrow
2 afternoon. Let's hear another witness. Why don't we do
3 one more witness. One more witness. Call Mr. Maher, if
4 you would.

5 MICHAEL MAHER

6 Witness having been first
7 duly sworn, testified on

8 DIRECT EXAMINATION

9 BY MR. GARLAND:

10 Q Give us your full name, please, sir.

11 A It's Thomas Michael Maher, M-A-H-E-R.

12 Q Where do you reside, Mr. Maher?

13 A In Roanoke, Virginia.

14 Q By whom are you employed?

15 A Norfolk Southern Corporation.

16 Q And in what capacity are you employed by Norfolk
17 Southern?

18 A I am System Manager, Disability Support Services.

19 Q How long have you been with Norfolk Southern?

20 A With the company since August of 1981.

21 Q Give us, if you will, please, sir, a little
22 information. Where were you born and raised?

23 A Charleston, West Virginia.

24 Q Where did you -- did you go to high school there?

25 A Yes, Charleston Catholic High School.

1 Q Went to college there?

2 A Went to Marshall University. I have a degree in
3 Counseling and Rehabilitation Services, and a nursing degree.

4 Q Now, when you -- did you work elsewhere before
5 hiring on with the railroad?

6 A Yes. I worked as a nurse in Portsmouth, Ohio..

7 Q For what period of time?

8 A 1978 to August of 1981.

9 Q When you first hired on with the railroad, what
10 division or department were you in?

11 A I was a brakeman on the Virginia division in
12 Roanoke, Virginia.

13 Q Go ahead and walk us through, please, your railroad
14 career, as to what positions you held and where they were
15 located.

16 A I was a brakeman in Roanoke from August of '81 until
17 approximately June of 1983; and then I took a leave of
18 absence, went back to Ohio, worked as a nurse, went back to
19 get some more schooling; became a claim agent in Norfolk,
20 Virginia, in approximately November of 1985; and then went to
21 Chicago, Illinois, as a claim agent in September of 1990; and
22 then came back to Roanoke as a Senior Claim Agent in the
23 summer of '96. I forget the exact date. And then was --
24 worked as a Senior Claim Agent, District Claim Agent, and then
25 came over to the section I am in now as a manager in -- on

1 June 1st of 1998. And then I took the present position March
2 1st of last year.

3 Q Present position being the man in charge of that
4 department; is that right?

5 A Yes, sir.

6 Q Explain to us exactly what is the Vocational
7 Rehabilitation Department. What is -- how is it set up, what
8 is the purpose of it?

9 A Well, it's -- the disability support services
10 section is a program that is a benefit of all railroad
11 employees, and it's designed to help injured and ill employees
12 return to work. It's composed of two sections, two
13 components, I guess; one is medical management, and that's
14 where we hire outside registered nurses who are trained in
15 occupational injuries, and they work with the employee, with
16 the doctor and the family as a consultant to help the employee
17 get back to work as soon and safely as possible. And then, if
18 at some point in time during that period there appears that
19 the employee is not going to be able to go back to their
20 former position then the vocational rehabilitation component
21 takes over, and we work in trying to primarily -- our primary
22 goal is to try to get the employee back to some position
23 within the company. And if those doesn't appear possible,
24 then we hire outside vocational counselors to work with the
25 employee in trying to find something for them outside the

1 railroad.

2 Q Now, have you had occasion to work with Mr. Lester
3 Kirkland?

4 A Yes, sir.

5 Q And his lawyer, Mr. James Wettermark?

6 A Yes, sir.

7 Q Let me show you some correspondence. And have you
8 corresponded with both gentlemen?

9 A Yes, sir I have.

10 Q Let me show you Defendant's Exhibit 15. And is that
11 a letter that you wrote to Mr. Wettermark with a copy to Mr.
12 Kirkland?

13 A Yes, sir, it is.

14 Q And the date of that is what, please?

15 A That is August 12th, 1999.

16 Q Now, what are you asking for in that letter, please,
17 sir?

18 A Well, I offered the medical management, if he wanted
19 to talk to a medical management nurse to let me know. And
20 then also, I was requesting updated medical reports in order
21 to send them to the medical department. I work very closely
22 with, of course, all departments of the railroad, but the
23 medical department especially. It's the railroad's medical
24 department who determines what the medical qualification of
25 all its employees to be able to work for the railroad.

1 Q Look at Defendant's Exhibit 16, which is another
2 letter, and the date of that is what, please?

3 A This letter is dated August 31st, 1999.

4 Q From you to who?

5 A It's from me to Mr. Wettermark with a copy to Mr.
6 Kirkland.

7 Q Now, does this -- what does this letter deal with,
8 please, sir?

9 A Well, prior to writing this letter, it was my
10 understanding that Mr. Kirkland was interested in working as a
11 dispatcher. It's my understanding he had prior dispatcher
12 experience. Dispatchers are employees that coordinate the
13 movement of trains out on the road, not necessarily within a
14 yard. And so I was mentioning there were some dispatcher
15 positions in Atlanta, Georgia and Dearborn, Michigan.

16 Q Do you recognize Defendant's Exhibit 17?

17 A Yes. This letter is dated September 8th, 1999.
18 It's from Mr. Wettermark to me with a copy to Mr. Kirkland.

19 Q And the nature of that is what, please?

20 A Mr. Wettermark was apprising me that he had talked
21 with Mr. Kirkland concerning the dispatcher jobs, and that he
22 would -- was interested in a position in his own geographic
23 area.

24 Q Now look at Defendant's Exhibit 18. What is the
25 date of that letter?

1 A It's dated September 16th, 1999, it's from Mr.
2 Wettermark to me with a copy to Mr. Kirkland.

3 Q That is from --

4 A I'm sorry, excuse me. It's from me to Mr.
5 Wettermark dated September 16th, 1999.

6 Q What does that letter deal with, please, sir?

7 A It's -- well, I said, I understand the desire to
8 stay in his own locality and that there were no light duty
9 positions in his geographical area at this time. And that I
10 would notify him if one did come up. And then went -- talked
11 some more about some further medical reports.

12 Q Now, coming on forward, look at Defendant's Exhibit
13 19. And what is the date of that letter, please, sir?

14 A It's December 16th, 1999; it's from me to Mr.
15 Wettermark.

16 Q What is the -- look at the third paragraph, and what
17 does that letter concern, primarily?

18 A I was letting them know that there were clerical
19 vacancies in the centralized yard office in Atlanta that were
20 available, and also that there were dispatcher vacancies in
21 the Crew Management Center in Atlanta. All of those positions
22 were available at that time.

23 Q Defendant's Exhibit 22, do you recognize that
24 letter, please?

25 A Yes, sir, this is a letter from me to Mr. Kirkland,

1 dated February 18th of 2000.

2 Q Does that deal with the dispatcher's position and
3 also the request to know about any medication that he may be
4 taking?

5 A Yes. We were arranging a meeting between Mr.
6 Kirkland and the superintendent of -- in Greenville, to
7 discuss aspects of the dispatcher position. And then there
8 was -- Mr. Kirkland had mentioned some of the medications that
9 he had been taking, and I was asking for more specifics, you
10 know, the dosage, the frequency, so that I could pass that
11 information on to the medical department for them to -- which
12 is important for them to determine medical qualification to
13 work.

14 Q Did you receive Exhibit 27? Do you recognize that,
15 and if so what is that letter and who is it from?

16 A This is a letter dated March 9th, 2000, from Mr.
17 Wettermark to me, indicating the dosage and frequency of the
18 medication. He was responding to my last letter.

19 Q Did it come about that because of the dosage of
20 medication that he could not hold a dispatcher's job?

21 A That's correct.

22 Q Why was that, as you understand it?

23 A Well, you have to be -- in communicating with the
24 medical department it is my understanding that you can not
25 take certain medications, primarily narcotics, within six

1 hours of reporting for your tour of duty, nor during your tour
2 of duty. So essentially, you have to be narcotic free for at
3 least six hours prior to going to work. And that was
4 indicated that he wasn't.

5 Q And I show you a letter identified as Defendant's
6 Exhibit 24, letter of March 20th, 2000. Look at that, and
7 please tell me who it's to and what the subject of that letter
8 is.

9 A This is a letter from me to Mr. Kirkland, and this
10 was after I understood that Mr. Kirkland had met with Mr.
11 Alley, who was in charge of the dispatchers in Greenville.
12 And Mr. Kirkland met with Mr. Alley, they discussed aspects of
13 the job and --

14 Q Does that advise him of the clerical vacancies, and
15 if so, where and how many?

16 A Yes. There were -- at the time of this letter,
17 there were 11 clerical vacancies in the centralized yard
18 office in Atlanta, Georgia. And -- but I went on to state
19 some other requirements.

20 Q How did he respond to your advice to him that there
21 were clerical vacancies, 11 at that time, in Atlanta, Georgia?

22 A Well, primarily, he didn't want to move to Atlanta
23 to take advantage of those opportunities to return to work.
24 He wanted -- was more interested in staying near his home.

25 Q Did you offer the services of any outside

1 rehabilitation firm to try to assist him in finding full time
2 employment in the area, or that area of South Carolina?

3 A Yes, sir.

4 Q What firm did you employ?

5 A The particular name of the firm was GENEX. We
6 utilize maybe nine or ten different companies throughout the
7 system, and that was just one that there would be someone
8 nearby.

9 Q Have you had occasion in the past to be familiar
10 with and use GENEX?

11 A Well, yes, we have used GENEX a lot. I was not
12 familiar --

13 Q Are they nationwide or just in Carolina? Where are
14 they?

15 A No. They are -- well, all I am concerned about is
16 system-wide. They are at least -- they cover a good part of
17 the eastern United States.

18 Q And is that the system where Norfolk Southern
19 operates?

20 A Yes.

21 Q And it was, in fact, a vocational rehabilitation
22 counselor assigned to Mr. Kirkland's case?

23 A Yes, sir.

24 Q And what was her name?

25 A It's Geneva Bookman-Billups.

1 Q And that was -- was that at a time when the other
2 employment within the railroad has been exhausted in that you
3 have offered him these clerical positions, and for his own
4 reason, he decided not to accept that, and is it that time
5 when you employed this outside agency?

6 A That's correct. I mean, it's as a last resort,
7 really, because our primarily goal is to try to get the
8 employees back to work within the company.

9 Q If Mr. Kirkland had decided to accept one of the
10 clerkship jobs, Mr. Maher, would his benefits, by that I mean
11 insurance and all that, been the same in a clerk position with
12 Norfolk Southern as it was as a conductor with Norfolk
13 Southern?

14 A Yes, sir, the benefits are essentially the same.

15 Q Company-wide?

16 A Yes, sir.

17 Q Now, you have testified of your career with the
18 railroad. In your personal observations and knowledge, are
19 railroad employees transferred or moved from divisions to
20 divisions and states to states throughout the system?

21 A Yes, sir. If you want to work for the railroad, you
22 sometimes have to go where the job is.

23 Q And do you know whether or not the centralized
24 clerks in Atlanta -- in fact, the office grew because of
25 moving in clerks from throughout the system into a centralized

1 location?

2 A Yes. And it's still growing, because they still
3 need positions to be filled.

4 Q Let me ask you one other thing. If the vacancies
5 are still there would those vacancies still be available to
6 Mr. Kirkland?

7 A Absolutely. This program is available to Mr.
8 Kirkland as long as he remains an employee.

9 Q And you still participate in it, but Ms. Bookman is
10 now the one who is trying to locate the job in South Carolina;
11 is that correct?

12 A Outside, yes.

13 MR. GARLAND: I think that is all I have of this
14 witness.

15 THE COURT: Mr. Wettermark?

16 CROSS EXAMINATION

17 BY MR. WETTERMARK:

18 Q Mr. Maher, as far as responding, communication
19 between Mr. Kirkland and you, he has -- every time you have
20 responded to him he has been quick to write back to you or
21 call you back, hasn't he?

22 A As far as I can recall, yes.

23 Q Do you recall that early on, when you made him
24 offers of rehabilitation, that he wrote you a letter saying,
25 look, I am still seeing my doctors. I'm not ready to give

1 up. I'm going back to work as a conductor. -- Oh, I'm sorry.
2 And I apologize, Mr. Maher, I know that puts you in an
3 uncomfortable position, too. Do you recall early on that he
4 wrote you several letters, basically saying, I am still being
5 seen by my doctors. I'm hoping to get back to work as a
6 trainman. I'm not quite ready for your services?

7 A As best I can recall, yes.

8 Q And then finally, when his doctors disqualified him,
9 said he couldn't ever go back to work as a trainman, he wrote
10 you that first letter in March of 1999, saying, my doctors
11 have disqualified me, I am ready for your help?

12 A Well, I would have to look at the letter to know
13 exactly what he said, but as best I can recall, yes.

14 Q In that very first letter asking for your help,
15 didn't he have just one request, in that he told you that
16 because of his family considerations, his family being there,
17 that he would ask you to try to find work in his geographical
18 area?

19 A Yes.

20 Q Pretty reasonable request, isn't it?

21 A I certainly respect anyone wanting to stay in their
22 locale?

23 Q Are you married?

24 A I am divorced.

25 Q Do you have children?

1 A Yes, sir.

2 Q Do they live near you?

3 A They relocated with me when I came down from Chicago
4 to Roanoke.

5 Q Would you be willing to move away from your children
6 to go find work?

7 A In order to feed myself and them, I would go
8 wherever the paycheck is.

9 Q So you would move to another state and leave your
10 children behind, to find work?

11 A I have done that temporarily before, yes. In fact,
12 every move entails that.

13 Q Would you do that on a permanent basis, sir?

14 A If it was necessary for employment and I thought it
15 was better -- for my betterment and my family's, my
16 children's, yes, I would.

17 Q Did you learn from your conversations, or letters
18 with Mr. Kirkland, that he was divorced and that his daughter,
19 his daughter of his heart, lived in South Carolina, and if he
20 went to Atlanta he would have to leave her behind?

21 A I don't recall really the particulars of that, but I
22 understand something like that, that he wanted to stay near
23 his family.

24 Q It is my understanding, sir, that all the time -- I
25 guess it was nearly two years now, that you have been working

1 on his rehabilitation, you have only made him one job offer on
2 Norfolk Southern that's in his area, and that was the
3 dispatcher's job in Greenville?

4 A In Greenville, South Carolina, yes.

5 Q And he immediately said, "Yes, let me try that one";
6 is that right?

7 A Yes, sir.

8 Q And he went and did the interview and did everything
9 you asked of him. And it was the railroad that says, no, you
10 can't work this job for medical reasons?

11 A That's correct.

12 Q And the medical reasons were because railroad
13 employees are subject to strict requirements as far as what
14 medications they can take?

15 A That's -- well, in conjunction with the federal
16 government, federal regulations, yes.

17 Q Sure. These guys are subjected to random drug
18 screen by the Federal Railway Administration?

19 A Well, I don't know about that.

20 Q What about the clerks? Can clerks take narcotic
21 medications?

22 A Non-safety-sensitive jobs -- well, no job can take
23 narcotics, but non-safety-sensitive jobs have a less
24 restricting medication profile than safety-sensitive jobs,
25 such as a dispatcher.

1 Q I think what you just said is common sense; no jobs
2 can they work if they are taking narcotic medications, right?

3 A All I know is the medical department has medically
4 qualified him for a clerical position, now that's with
5 knowledge of all the existing medication that he is taking.

6 Q Actually, the process with that dispatcher's job in
7 Greenville, didn't it happen just the way all these clerk jobs
8 are, where you sent him a letter and said, there's a job
9 available in Greenville. And he said, great, I want to apply
10 for it. He went to apply for it, and only then did the
11 medical department look into him?

12 A Well, it was my understanding that he wasn't
13 applying for it, he went to talk to Mr. Alley to find out more
14 about it. And during that conversation, certain things that
15 -- it's my understanding, certain things that Mr. Kirkland
16 said indicating that he may not -- he may not feel like he can
17 do it.

18 Q Do you have any written letters or any record from
19 the railroad's medical department saying that he is qualified
20 for a clerk's position?

21 A Well, I have communications with Dr. Lena in the
22 medical department.

23 Q Do you have anything in writing that says he is
24 qualified to be a clerk on Norfolk Southern Railroad?

25 MR. GARLAND: You mean other than Exhibit 24, which

1 says that?

2 MR. WETTERMARK: I am asking him.

3 MR. GARLAND: Well, I think you ought to show
4 him --

5 THE COURT: Well, you will have a chance for
6 redirect.

7 Q Mr. Wettermark: Are you aware of any records
8 that you have from the Medical Department of the railroad,
9 saying that he is qualified to be a clerk?

10 A Medical records?

11 Q Or communication from the medical department that
12 you can show this jury, where the Medical department and says
13 he is qualified to be a clerk?

14 A Well, the way the process works is, I send the memo
15 to the medical department asking Dr. Lena, she's one of the
16 medical directors, to review the medical file, in this case of
17 Mr. Kirkland. And then to advise me of Mr. Kirkland's medical
18 qualification to return to either his former position or to an
19 alternate position. And in the communication back, I was
20 surprised that he qualified for a clerical position,
21 non-safety-sensitive position.

22 Q I guess my question is, do you have anything in
23 writing from the medical department saying he is qualified as
24 a clerk?

25 A We have my writings of my communication over the

1 phone with the medical department.

2 Q Do you have -- I mean, that's not what I'm asking
3 you. Do you have any documents with you from the medical
4 department that says, Norfolk Southern Medical Department,
5 this man is qualified as a clerk?

6 A That's not how the process works. I don't get -- I
7 send the medical department medical reports. Then I ask them
8 to review them and let me know, meaning call me up or
9 sometimes they may send me an internal memo, but most of the
10 times, Dr. Lena calls me up and I jot down notes and send them
11 in a letter apprising whoever of that medical determination.

12 Q And again, and I don't mean to put -- my question
13 simply was, in Mr. Kirkland's case, do you have anything in
14 writing from the medical department?

15 A Directly from the medical department, no. I have a
16 communi -- my writing of that communication over the phone.

17 Q Do you know what narcotic medications he takes now?

18 A At this minute, no. But the last thing I saw was
19 Ultram, which I can't remember if that's an artificial or a
20 non-narcotic. I forget how it's classified.

21 Q Did you know that the pain management doctor who is
22 treating him has him taking 20 milligrams of Oxycontin three
23 times a day, three doses a day?

24 A I don't remember the exact -- that's one of the
25 medications I saw in that letter.

1 Q Oxycontin is a very powerful narcotic, is it not?

2 A It's new since I was a nurse, I am not acquainted
3 with it.

4 Q You have been watching TV these last months, and
5 read about all the uproar over Oxycontin abuse out on the
6 street world, haven't you?

7 A I'm vaguely familiar with it through newspaper
8 articles, yes.

9 Q Mr. Maher, in the last two years is there not a
10 single job on Norfolk Southern Railway that you could find for
11 this gentleman, in either Columbia, South Carolina;
12 Greenville/Spartanburg, South Carolina; or Augusta, Georgia,
13 or any of the towns in between?

14 A Within the last two years the dispatcher position
15 was one we found that unfortunately didn't turn out to be
16 feasible. But other than the clerical positions in Atlanta at
17 the present, those are the only ones available.

18 Q You weren't able to find him any clerical positions
19 in any of those towns I just mentioned?

20 A No, sir, that's why we hired the GENEX vocational
21 counselor.

22 Q Weren't able to find him anything in sales or
23 marketing or accounting, or even where you came from, claims,
24 no jobs like that were -- that you could find for him,
25 anywhere in those cities in South Carolina, or anywhere

1 between?

2 A No, sir.

3 Q Do you all have a safety department?

4 A Yes, sir.

5 Q Could you find him a place in there?

6 A There were no positions available.

7 Q Think they might need some people in that
8 department?

9 A We can't create positions.

10 Q You came out of the claims department of the
11 railroad?

12 A Yes, sir.

13 Q The claims department, your -- when people get hurt
14 like that, you are kind of their -- you are the person who is
15 on the other side; is that right?

16 A That's your characterization. No, I have never --
17 never once looked at it that way.

18 Q How many times have you dealt with lawyers, like
19 myself, who represent injured railroad workers?

20 A I haven't the slightest idea, many times.

21 Q Hundreds? And you are not telling this jury that we
22 are not adversaries, are you?

23 A You create that, that's your terminology. My --
24 when an employee -- when I was a claim agent, when an employee
25 got injured, my goal was to help them get back to work as soon

1 as possible.

2 Q It wasn't your goal also to try to settle his claim
3 for as little as possible?

4 A To settle the claims fairly.

5 Q And did you always -- your idea of what was fair,
6 was that always the same as the employee's idea of what was
7 fair?

8 MR. GARLAND: Your Honor, I am going to object to
9 this line of questioning.

10 THE COURT: Sustained.

11 MR. WETTERMARK: You're right.

12 THE COURT: You've gotten a little afield there,
13 Mr. Wettermark.

14 MR. WETTERMARK: It's getting late, Your Honor.
15 Mr. Maher, thank you for coming down here.

16 THE COURT: Any redirect?

17 MR. GARLAND: Just briefly.

18 REDIRECT EXAMINATION

19 BY MR. GARLAND:

20 Q Mr. Maher, Exhibit 24, a letter that you wrote March
21 20th, 2000, to Mr. Kirkland, please read the first two
22 sentences of the second paragraph to the Jury.

23 A "Norfolk Southern's medical department informed me
24 you were medically qualified to return to an alternate
25 clerical position within the company. There are currently

1 eleven clerical vacancies in the centralized yard office in
2 Atlanta, Georgia."

3 Q Did Mr. Kirkland indicate to you his interest in
4 pursuing any of those eleven clerical jobs in Atlanta?

5 A No, sir.

6 MR. GARLAND: That's all.

7 THE COURT: Is that all for this witness?

8 MR. WETTERMARK: Just one more question.

9 RE CROSS EXAMINATION

10 BY MR. WETTERMARK:

11 Q Let me just ask this. To be a clerk, don't you have
12 to be an accomplished typist?

13 A 35 words per minute, yes, sir.

14 Q Can this man type?

15 A I haven't the slightest idea, but if he can't, I'll
16 send him to typing school.

17 MR. WETTERMARK: I see. Thank you, sir.

18 MR. GARLAND: One other question.

19 THE COURT: One more question?

20 REDIRECT EXAMINATION

21 BY MR. GARLAND:

22 Q Mr. Maher, you also have offered, have you not,
23 vocational training and/or college training if that's
24 required, or if he desires it?

25 A If that is what is necessary to help get back to

1 work, that's what -- that's part of the program.

2 Q And has he indicated any indication to you that that
3 is something that he desires up to this point?

4 A I haven't heard.

5 Q But that offer is still open to him; is that
6 correct?

7 A As long as he is an employee, the whole program
8 benefits are available.

9 MR. GARLAND: That's all I have.

10 THE COURT: May he be excused?

11 MR. WETTERMARK: Yes, sir.

12 MR. GARLAND: Yes, sir.

13 THE COURT: We are going to call it a day. All
14 right. I think, again, we put in a full work day today,
15 so will take our evening break. Please recall my
16 instructions about not talking about the case among
17 yourselves as you leave, or with anybody at home, or
18 being around anybody talking about the case out in the
19 hall when you get here in the morning, or what not. We
20 will start again tomorrow at 9:00 o'clock. My best
21 information from the attorneys is we should finish the
22 evidence before lunch tomorrow, which should, at a
23 minimum, allow us to do our closing arguments and charge
24 of the -- that I will give you first thing after lunch,
25 and give it to you tomorrow afternoon. Once it's in your

1 hands, it will be up to you as to how long you need, of
2 course. That's our best sense of how tomorrow should
3 proceed, and if we get the evidence in earlier, before
4 lunch, we can take an early lunch break, or whatever, we
5 will just -- but that's the way it looks for tomorrow.
6 So again, which a reminder about my instruction on not
7 discussing the case, I want everyone else to stay where
8 you are while these Jurors are excused, and return at
9 9:00 o'clock in the morning.

10 (JURY LEAVES COURTROOM)

11 THE COURT: You need to say something, Mr.
12 Garland?

13 MR. GARLAND: Your Honor, I would like to tender in
14 these exhibits introduced this afternoon.

15 THE COURT: You talking about the ones -- let's
16 see -- you want to let Mr. Wettermark look at the ones
17 you are wanting to tender at this time? I know you used
18 a number with the witnesses, I don't know if you are
19 talking about -- There's a number of letters and
20 documents laying there on the bench, I don't know if
21 those are all -- for the sake of the record, we'll need
22 to run through the numbers to be sure we've got our
23 signals all straight on what's being tendered and whether
24 there's any objections and what not. Why don't you run
25 through those, Mr. Garland?

1 MR. GARLAND: All right, sir. Exhibit 23,
2 Defendant's Exhibit 23, a letter of March 6th, 2000 from
3 Mr. Maher.

4 THE COURT: Perhaps, you all can --

5 MR. WETTERMARK: Make a deal with you.

6 THE COURT: -- Look through those and --

7 MR. WETTERMARK: Why don't you take this home
8 with you and see if you have correspondence that's not on
9 this list.

10 THE COURT: I may let you all do that after I
11 step out rather than taking up the court reporter's time,
12 and --

13 MR. WETTERMARK: We'll work it out.

14 MR. GARLAND: We'll work it out.

15 THE COURT: You all get it all straight about
16 what you want to offer, and if there's any objections
17 that require a ruling or not, no objections, then just
18 what will be admitted without objection, and be sure we
19 have got the record clear on that, myself and the court
20 reporter.

21 As far as tomorrow morning, Mr. Wettermark, you had
22 earlier noted some potential objection to the Defendant's
23 economist. I assume that will come up in the morning.
24 You will call an economist, Mr. Garland?

25 MR. GARLAND: And he has taken out that calculation

1 about --

2 THE COURT: That's the one you had cited a case
3 that you said was -- that I never got a -- is that issue
4 gone; is that what you are telling me?

5 MR. WETTERMARK: No, that issue is still here.

6 THE COURT: I never got a cite.

7 MR. GARLAND: Looks like to me, Judge, that's just
8 a question of cross examination, if he contends he does
9 it someway different, he contends he does it correctly.

10 THE COURT: And there were two issues I made a
11 note of, one was about the mortality table that this
12 economist would propose to use that relates to railroad
13 employees, and arguably is not a -- doesn't meet the
14 standards for such tables, according to the position Mr.
15 Wettermark would apparently take. I don't know. I mean,
16 I just want to -- if there is anything I can look at this
17 evening, so we don't get bogged down in the morning with
18 the jury here, I would like to do that.

19 MR. GARLAND: Judge, there are two tables, and I
20 think his witness went into a discussion of the two. He
21 says he uses one and not the other. This economist
22 agrees that there are two, and he says he uses this one
23 and not the other, and he will give reasons why. As this
24 one (indicating), this one gave reasons why he didn't use
25 the railroad specific.

1 THE COURT: Right. He did testify something
2 about the railroad -- or table specific to railroad
3 employees, and apparently said it wouldn't be
4 trustworthy, I think is what he said, or reliable.

5 MR. GARLAND: I think in this particular case they
6 are pretty close to the same. They are not always close
7 to the same, but I think they are in this case.

8 THE COURT: Well, I mean, they have the same work
9 expectancy, or life expectancy, whatever may be there. I
10 don't know that there's really an issue; is there, Mr.
11 Wettermark?

12 MR. GARLAND: James, do you know the difference?

13 THE COURT: Well, maybe you all can chat about
14 that, too, after I step out. If we could get together in
15 the morning at 8:30 -- I know you are little weary, it's
16 been a long day; you all kept things moving, I appreciate
17 that, made good progress with the case. And maybe you
18 can kind of catch your breath and talk to one another
19 this evening, and maybe in the morning, we can quickly
20 move through the issues. That's the only thing I had
21 left was just your potential objection to the economist
22 Mr. Garland would call on a couple of points. Maybe you
23 all can talk and sort them out, and if you can't I'll
24 rule on them. But why don't we do that at 8:30 in the
25 morning?

1 MR. WETTERMARK: That would be great.

2 THE COURT: Maybe so you all can just kind of
3 streamline things. The verdict form, we talked about it
4 at the pretrial conference. You had submitted something,
5 Mr. Wettermark as an attachment to the proposed pretrial
6 order and -- where you had quite a breakdown of
7 liability, and what not, and then as we discussed it, I
8 think we evolved to the -- maybe the idea of just the
9 general verdict form, but --

10 MR. WETTERMARK: I'm inclined to do a general
11 verdict form, just find in favor of the --

12 THE COURT: Plaintiff in the amount of? Here's
13 -- I mean, this is one we've used, I mean.

14 MR. WETTERMARK: I think that's probably what we
15 ought to use.

16 MR. GARLAND: I would like to be heard on that. I
17 think -- we requested in the pretrial and still request
18 the special verdict that takes into consideration
19 negligence and contributory negligence, and then breaks
20 it down like that. And I think that is -- that's the one
21 I know we have used in this court on other occasions. I
22 feel that more specifically answers all the questions in
23 a case like this.

24 THE COURT: Well, I guess -- I had, thus far in
25 my short career, tended to kind of let the lawyers try to

1 reach some agreement, if they could, on a verdict form,
2 and thus far, I haven't had a problem with it. I have
3 occasionally suggested something, as the lawyers and I
4 have discussed it together, and we would work towards a
5 consensus. If we couldn't do that I guess I will make a
6 ruling.

7 MR. GARLAND: Can we talk about this in the
8 morning?

9 THE COURT: We can talk about that in the
10 morning, too, when we're fresh. I think it's been a long
11 day. All right, so the verdict form, the exhibits, and
12 any issues about the Defendant's economist. As I
13 understand it, we'll first do Dr. Kessler in the morning
14 at 9:00 o'clock when we start, and that will conclude the
15 Plaintiff's case in chief. The Defense will then have a
16 chance to continue with its case, again, with the idea
17 that we'll conclude the evidence by lunch. Does that
18 still look like a reasonable prediction?

19 MR. WETTERMARK: I think we are right on
20 schedule.

21 THE COURT: It seems like we are. Was there
22 anything else to talk about today or to be sure we are
23 prepared for tomorrow?

24 COURT IN RECESS: 5:45 p.m.
25

CERTIFICATE OF REPORTER

GEORGIA, JONES COUNTY:

I, Julia J. Scarborough, CCR, B-908, CERTIFY that acting in such capacity on March 20, 2001, I reported the trial in the above captioned case held before Hon. William Adams, and on the foregoing pages, numbered 6 through 228, both inclusive, have transcribed a true and accurate transcript of the same.

I FURTHER CERTIFY that I am not counsel for nor related to any of the parties; nor am I interested in the event or the outcome thereof.

WITNESS my hand and official seal this 30th day of April 2001.

Julia J. Scarborough CCR
Certificate No. B-908